

ADVERTISEMENT.

IF the observations now offered to the public, are favourably received, they may possibly give rise to others of more importance; if they are disliked, their shortness will be some apology.

Though many volumes have been written on the books of Moses, in which the Judicial and Ceremonial Law are blended together; yet no author, as far as I can learn, has separated the one from the other, or reduced either into a regular method. In the following attempt towards a system of the Judicial Law of Moses, the words of the sacred writer are preserved; and where there are several texts to the same purpose, that one is selected which expresses the doctrine with

iv ADVERTISEMENT.

the greatest perspicuity and force. Nothing merely ceremonial is inserted, unless analogous to some law or custom received in other countries. The Notes consist chiefly of quotations from the Roman Law, which bear a striking resemblance or dissimilitude to the passages of the Jewish Law to which they are subjoined. In the Contents which are added to this system, not only a summary, but a short comment or illustration will sometimes be found.

TABLE

TABLE of the OBSERVATIONS on the SCOTCH LAW.

Obs. 1.	Suspension of ministers	—	1
2.	Seats in churches	— —	9
3.	Tithes and church lands	—	13
4.	Sunday	— —	19
5.	Tutor-dative	— —	23
6.	Minor with curators	—	26
7.	Minor without curators	—	27
8.	A case	— —	29
9.	Tutrix	— —	31
10.	A case	— — —	33
11.	Marriage	— —	35
12.	Of the paternal power	—	36
13.	De heredibus instituendis	—	40
14.	Passive title	— —	41
15.	Warrandice	— —	45
16.	Personal and transmissible	—	47
17.	Ufusfructus	— —	48
18.	Heirs female of provision	—	50
19.	Arbiter	— —	70
20.	Mandate to a lawyer	— —	72
21.	Advocations	— —	75
22.	Votes	— — —	76
23.	Res nullius	— —	78
24.	De periculo rei venditæ	—	80
25.	Servants buying in the name of their masters	— — —	91
26.	Servitude	— —	95
27.	Arrestment	— —	100
28.	De accusationibus	—	105
29.	Murder	— —	113
			Obs.

vi CONTENTS.

Obs. 30. Rape	— — —	118
31. Fire-raising	— — —	123
32. Forgery	— — —	129
33. Theft	— — —	130
34. Pigeons	— — —	132
35. Resettlers	— — —	139
36. De criminibus extraordinariis	—	142
37. Fine	— — —	145
38. Insolvent debtor	—	147
39. Witness	— — —	153
40. Qualified oath	—	155
41. Effect of a capital sentence	—	156
42. Execution of a capital sentence		160

TABLE of the OBSERVATIONS on the JEWISH LAW.

Obs. 1. Of the law	— — —	164
2. Of jurisdiction and judges	—	167
3. Distinction of persons	—	169
4. Slaves	— — —	171
5. Parents and children	—	174
6. First-born	— — —	178
7. Of the Egyptian loan	—	181
8. Sale	— — —	185
9. De acquirendo rerum dominio	—	187
10. Mandate	— — —	<i>ib.</i>
11. Servitude	— — —	188
12. Of vows	— — —	189
13. Deathbed	— — —	190
14. Theft	— — —	192
15. Holy oil	— — —	196

Tit.

C O N T E N T S. vii

18	Tit. 16. High treason	—	197
23	17. Murder	— —	201

TABLE of the Titles of the System of the Judicial Law of MOSES.

B O O K I.

- Tit. 1. State and distinction of persons.
2. Jurisdiction and judges.
3. Slaves.
4. Parents and children.
5. Marriage.
6. Vows.
7. De jure militari.

B O O K II.

- Tit. 1. De acquirendo rerum dominio.
2. Servitude.
3. Succession.

B O O K III.

- Tit. 1. De rebus creditis.
2. Commodate.
3. Deposit.
4. Pledge.
5. Sale.
6. Location.

B O O K IV.

- Tit. 1. Theft.
2. Damage.

Tit.

Tit. 3. Si quadrupes pauperiem, &c.

4. De termino moto.

5. Injury.

6. Murder.

7. Plagium.

8. Treason.

9. Adultery.

10. Stuprum.

11. Rape.

12. De venere nefanda.

13. Probation.

14. Punishment.

OBSERVATIONS

ON

Some Points of LAW.

OBS. I.

Suspension of Ministers.

“ **A** Suspension of a minister (says
“ the late institute *) does not
“ bar him from the stipend or
“ other rents during its cur-
“ rency, because the statute † does not ex-
“ tend to that case; so that it resolves on-
“ ly into a bill of ease, till it is taken off
“ or expires. By the Canon law, sus-
“ pensions were both *ab officio et beneficio*;
“ which it were to be wished took place
“ with us, for then they would be more
“ regarded than they generally are.”

It is surprizing, that this learned author,
as well as the other writers on our law,

* II. 79. 225.

† 1584. c. 132.

A

should

should have overlooked several acts of parliament, which set this matter in a very different light, and prove, beyond all contradiction, that, by the statute law of Scotland, the suspension of a minister excludes him from the emoluments of his benefice, as well as from the exercise of his office.

The act 20. parl. 1644 is in these words.
 “ The estates of parliament, presently
 “ convened by virtue of the last act of the
 “ last parliament holden by his Majesty
 “ and three estates *in anno* 1641, finding,
 “ that stipends and benefices of kirks
 “ now vaiking, or which hereafter shall
 “ vaike, by decease, deposition, *suspension*,
 “ or transportation of ministers, or by disunion of kirks, or any other ways, during
 “ the vacancy thereof, should be employed
 “ upon pious uses; do therefore ordain all
 “ patrons to employ the samen, with advice and consent of their several presbyteries, upon pious uses within the parish,” &c.

Act sess. 30. ass. 1648. “ The general
 “ assembly considering, that, according to
 “ the ancient order and practice of this
 “ kirk,

“ kirk, the censure of *suspension* and de-
 “ position of ministers is both *ab officio et a*
 “ *beneficio*, as is also acknowledged by the
 “ 20th act of the parl. 1644; and that the
 “ continuance of *suspended* or deposed mi-
 “ nisters in the exercise of the ministry,
 “ or in the possession of their stipend, hath
 “ been, and ought to be, accounted and
 “ censured, as a great contempt of the
 “ authority and censures of the kirk: con-
 “ sidering also, that the continuance of
 “ deposed ministers, in the possession of
 “ the stipend, is a great prejudice and ob-
 “ struction to the planting of the vaiking
 “ kirk, and to the service of God there:
 “ Therefore do declare and ordain, That
 “ whosoever, after the sentence of depo-
 “ sition pronounced against them, do ei-
 “ ther exercise any part of the ministerial
 “ calling in the places they formerly ser-
 “ ved in or elsewhere, or do possels, med-
 “ dle, or intromit with the stipend or o-
 “ ther benefits whatsoever, belonging to
 “ these kirks they served at, they shall be
 “ proceeded against with excommunication:
 “ and if any suspended minister, *during his*

A 2
suspension,

“ *suspension*, either exercise any part of the
“ ministerial calling, or intromit with the
“ stipend, that he be deposed; and after
“ deposition, continuing in either of these
“ faults, that he be processed with excom-
“ munication.”

Act 52. parl. 1661. “ Forasmuch as by
“ divers acts it is found, that stipends
“ and benefices of vacant kirks, or which
“ thereafter should vaik, by decease, depo-
“ sition, *suspension*, transportation of mini-
“ sters, disunion of kirks, or any other
“ way, should, during the vacancy there-
“ of, be employed on pious uses: And
“ the King’s Majesty considering, that,
“ duing these troubles, many learned and
“ religious persons in the ministry and uni-
“ versities, for their expressions of duty
“ and loyalty to his Majesty, or not con-
“ curring in the confusions of the time,
“ have been deposed and suspended from
“ their charge and ministry, and have been
“ otherwise put under great sufferings, and
“ they and their families redacted to ex-
“ treme misery and want; ordains all sti-
“ pends or benefices of kirks that are va-
“ cant,

“ cant, and not already disposed of, or
 “ which shall vaik, by decease, deposti-
 “ tion, *suspension*, transportation, or any
 “ other ways, to be employed for the sup-
 “ ply and maintenance, and towards the
 “ reparation of the sufferings and losses of
 “ the persons aforesaid.”

The act in K. William's time *, ratify-
 ing the confession of faith, and settling
 Presbyterian church-government, *inter alia*,
 provides, “ That whatsoever minister, be-
 “ ing convened before the said general
 “ meeting, and representatives of the Pres-
 “ byterian ministers and elders, or the vi-
 “ sitors to be appointed by them, shall ei-
 “ ther prove contumacious in not ap-
 “ pearing, or be found guilty, and shall be
 “ therefore censured, whether by *suspen-*
 “ *sion* or deposition, they shall *ipso facto*
 “ be *suspended* from, or deprived of their
 “ stipend and benefices.”

These statutes evince, that the law was
 once the very reverse of the practice at
 present, with which the generality of peo-
 ple are so much dissatisfied. Yet it may

* 1690. c. 5.

not without reason be maintained, that suspension ought not to be equal to a temporary deposition; and that the mitigation, which custom has introduced, is far from rendering the law either defective or irrational.

It may be safely assumed as an axiom, That generally speaking a minister's stipend is merely alimentary, no more than sufficient to afford a comfortable subsistence to himself and his family, from one end of the year to the other. This proposition the law itself takes for granted, and presumes that he is able to lay up little or nothing for his wife and children; and therefore makes more than one provision for them after his death*. Now, if suspension should operate *a beneficio*, as well as *ab officio*, the consequence would be, that as soon as a minister is suspended, his family

* *Viz.* the ann, and that which is settled 17^o Geo. II. 11. c. 11. intituled, *An act for the raising and establishing a fund for a provision for the widows and children of the ministers of the church of Scotland.* For the same reason, the stipends of ministers have been found not arrestable.

would

would be reduced to want, and continue in a needy and indigent condition, until the censure be taken off. Such management would be contrary to the spirit of our law, which allows the minister and his family the conveniencies, though not the superfluities of life; and contrary to the ecclesiastical policy which obtains both in England and Scotland: for the author I have already quoted, observes *, that in our neighbouring country, “ none is to be ordained a priest or deacon, without a title, “ *i. e.* some certain place, where he is to “ exercise his function, affording him a “ maintenance, lest through poverty he “ be a scandal to religion: And with us, “ (continues he), none is admitted a presbyter, until he be settled in some parish.” If our church will ordain no man a presbyter, until he be presented to some parish, lest through poverty he be a scandal to religion; would it not be absurd in the church, by its own sentence, to make him a scandal to religion after he is settled in one?

* II. 85. 10.

When a minister is deposed, the loss of his stipend is a just and necessary consequence of his deprivation; after that censure is inflicted, he is no more a minister; and as he serves no longer at the altar, he is not intitled to live any longer by it; besides, as his connection with his parish is loosed, he is at liberty to follow any other employment. But a suspended minister is not, for still he remains a minister. Nor is there any reason for complaining of the inefficacy of suspension, at least in this country. That censure is, and must be dreaded by all who have any principles, or any regard to their character; and the minister who is so abandoned as to feel no uneasiness on that account, will very probably soon incur deposition.

It may be deduced as a corollary from what has been argued above, That a minister who is unequal to the duties of his function, either from a perpetual or temporary indisposition, cannot be compelled to hire an assistant*. For since a minister, when suspended, loses no part of his reve-

* See the Inst. II. 82. 234.

nue, it would be glaringly unjust, that one who is superannuated or diseased, who is disabled, not by his fault, but his fate, should be more hardly dealt with, than he who is incapacitated for a misdemeanor.

O B S. II.

Seats in churches.

WHen an heritor sells his estate, his seat in the church will pass to the purchaser, though not expressly mentioned in the conveyance *; for it is not *separatum tenementum*, but part and pertinent of the lands.

Further, if an heritor first disposes his land to one person, and afterwards disposes his seat in the church *per expressum* to another; or if one creditor leads an adjudication of the lands, without mentioning the seat, and afterwards another creditor leads an adjudication, not only of the lands, but

* Voet. com. ad tit. de relig. n. 5. Instit. II. 70. 193.

of the seat too *per expressum*; it would seem that the first disposition and adjudication ought to carry the seat. *Arg. of the decision 28th Nov. 1755, Auchterlony*; by which the Lords preferred a prior adjudger of the lands, to the mines, though not mentioned in his adjudication, in competition with a subsequent adjudger, whose adjudication contained both lands and mines. This question about a seat in the church, was once litigated before the court of session, which varied in its interlocutors; so that the decision can claim no great authority. It is observed by Fountainhall, and abridged thus in the dictionary, under *Part and pertinent*. “ Two persons competing
“ about a seat in the church; the first
“ founded upon a disposition from the former possessor, from whom he had bought
“ some acres, to which the seat pertained;
“ but the disposition not mentioning any
“ seat, and the other claiming it, in virtue
“ of a posterior disposition to the seat *per*
“ *expressum*, and also to the mansion-house,
“ upon this narrative, *that the prior disposition made no special mention of the seat*;
“ the

“ the Lords found it comprehended under the first disposition, 15th January 1697, *Lithgow contra Wilkinson*; but in the like case preferred the latter to the seat, 10th Nov. 1698, *inter eosdem*.”

But from what has been said, it would appear that the first determination of the cause was the most consonant to principles.

It may be questioned, if an heritor can sell his land to one person, and his seat to another, or retain it for his own use? This is often done, and creates no small confusion; so that it were to be wished, if there is ground in law for it, that such pactions were of no force. If they are valid, it is a possible case, that all the seats in the church may come to belong to persons who have not one inch of ground in the parish. Besides, it may be thought, that he who buys land, and becomes an heritor in a parish, cannot renounce his seat, and so exclude himself and his tenants from the parish church, which he and they are bound to frequent. And therefore, such a reservation may be looked upon as a *pactum illicitum*, and repugnant to the public law.

There

There is not in the collections hitherto printed, any other decision of the court of session, about seats in churches, besides the one inserted above. But the courts in France have had many such questions before them. See the *dict. des arrests*, under *Bancs dans les eglises*, and under *Droits honorifiques*, where the following questions, How far a seat can be granted to a man and his heirs? Whether possession is of itself a good title to a seat? Whether the dissenters from the religion established by law can retain their seats? and many others, are decided *.

* Mr Forbes, who touches slightly on this subject in his treatise of church-lands and tithes, p. 210. 211. mentions a case, in which he says it was determined, that possession for forty years was not of itself a good title; but he does not point out the collection in which this case is to be found.

In some burghs, there are many burgessees, who have obtained rights to seats in churches, bearing to be to them, their *heirs and nearest representatives whatsoever, residing within the burgh*.

OBS.

O B S. III.

Tithes and church-lands.

“ **T**HE doctors (says Mr Forbes *)
 “ tell of a custom somewhere recei-
 “ ved, to pay the tithe of milk to that pa-
 “ rish where it is milked, and of cheese
 “ where it is made, and of the breed where
 “ they are brought forth. But where the
 “ tithe of milk is paid, there is nothing due
 “ for cheese made of the other nine parts
 “ on’t; and where the cheese hath been
 “ tithed, no tithe is to be paid for the milk;
 “ because *idem non debet bis decimari.*”

The same grain that owes multure, as
granum crescens, to the mill within whose
 thirl it grew, must pay a second multure
 when brought into a burgh, where the *inve-*
sta et illata are astricted, unless the right of
 these two thirlages be in the same person.
 The impropriety of whose claim for both,
 “ does not lie simply in demanding double
 “ duty for the same grain; but in de-

* Treatise of church-lands and tithes, p. 364.

“ manding twice the same duty for the
 “ same grain, upon the same *medium*, both
 “ upon the precise same cause and ac-
 “ count.” *Home remark. decis. n. 30.*

In those countries in which tithes of milk, cheese, &c. are exigible, it would seem that cheese ought not to be tithe-free, because the milk of which it was made, had paid tithe before: for the maxim, *Idem non debet bis decimari*, does, by no means apply; because cheese is not the same thing with milk, but quite different and distinct from it. It is indeed made out of milk; but then this making is a *specification*, which creates a substance as different from milk, as a suit of cloaths is from the piece of cloth out of which it was shaped, or as wine is from the grapes out of which it was pressed. Hence it is easy to see, that the tithe of cheese would not, in every case, be due with us, though that of milk would; because the tithe of milk is *predial*, and the produce of animals. Now, by our law, the tithes of animals, or the produce of animals, are due, though not accustomed to be paid; whereas the tithe of cheese is *personal*,

sonal, as cheese is not the product of animals, but the effect of industry; and consequently the tithe of it is not due, unless supported by forty years possession *. So that he who exacts teind for milk, and afterwards exacts teind for cheese made out of that milk, does not exact a double duty for the same thing, upon the same medium, both upon the precise same cause and account; which is the case in the decision above referred to; and consequently, tho' the right to both these tithes were in the same person, there would be no impropriety in his insisting for both. There is no absurdity in grain paying multure twice; but there is in any thing paying teind twice. The reason of the difference is obvious. Teind is a proportion due by law, and limited to a tenth; so that to exact more than a tenth, and yet call such exaction teind, is a contradiction in terms. But multures are due by the agreement of parties, and must therefore vary according to the constitution of the thirlage.

* See Erskine II. 10. 5. and the decisions there quoted.

“ Teinds before valuation (says Lord Stair *), are only due according to the crop and goods, without restraining the heritor in free use of his ground, who may leave it all grafs, though it had never been so long corn; and may flock it with yeld goods, which will yield no vicarage.” Mr Forbes says, that if an heritor throws all his ground into grafs, in order to elude payment of the tithes, the titular may apply for a valuation †. But it may well be doubted, if an action for valuation of tithes be competent to the titular against the heritor, tho’ it is competent to the heritor against the titular. This doctrine of Lord Stair about teinds, receives additional strength from a late decision about a thirlage. The representative of a tenant who was astricted by his tack to a mill, and bound to pay certain multures for all corn, either produced from his farm, or brought in for the use of his family, being pursued for astricted multures, objected, that his predecessor had, du-

* II. 8. § 31.

† Treatise of church-lands and tithes, p. 366.

ring his poffeffion, kept all his grounds in grafs; and that neither he nor his family had refided on the farm, and confequently that no multure could in terms of the tack be due. The Lords affoilzied the defender; 28th *November* 1755, *Grant*.

The claim of the relict for her terce, is far more favourable than that of the titular of the teinds, or proprietor of the thirl; and yet if the husband, in order to defeat the terce, fould not infeft himfelf in any of his lands, his widow would have no relief; for the terce is the third of the lands in which the husband died infeft. Now, if he died infeft in no lands, it is clear there can be no terce. Indeed in the cafe where the husband, on purpofe to cheat his wife, has infeft, not himfelf, but his fon, Craig feems to think the wife would have a claim, not to her terce, but to a reasonable allowance. See Lord *Bankton*, *Inf. I.* 661. 14.

“ The minifter (fays Mr Forbes *) has
“ right, during his incumbency, to the
“ church-yard, and may fhear the grafs

* *Treatife of church-lands and tithes*, p. 215.

“ on’t for the use of his horse and kine,
“ and may hinder others; but cannot cut
“ the trees growing there, though there is
“ action competent to him against those
“ who do cut them.” This Mr Forbes
says upon the authority of an English law-
book *: and that the law of England stands
so with regard to trees in the church-yard,
is certain; for, “ by the 35. Edw. I. the
“ parson cannot cut down trees growing in
“ the church-yard, unless for the repair
“ of the chancel, or (in charity) of the bo-
“ dy of the church †.” Whether the mi-
nister has a title to the grass and trees in the
church-yard, is a question which, I believe,
has not been tried before the court of ses-
sion. If ever such a question should oc-
cur, and be decided in favour of the mini-
ster, it behoved to be in regard to the prac-
tice of the country; for he has no right to
them by any statute.

As to trees growing in the glebe, it
would seem there could not well be a

* Degge’s parson’s couns. p. 1. c. 12.

† Wood’s Inst. p. 37.

doubt,

doubt, that the incumbent for the time being had a title to cut them. The law of France appears to be somewhat singular on this point. “ * Par deux arrêts du p. de
 “ Toulouse, des 13. Fevrier 1553. & 20.
 “ Juillet 1556, défenses ont été faites
 “ aux ecclesiastiques de faire couper des
 “ bois a haute futaye dependans de leur be-
 “ nefice; & en consequence le prieur de
 “ Pinel, en l’an 1582, fut empêché de
 “ continuer la coupe par luy commencée
 “ du bois du prieure. Defenses à l’Abbé de
 “ Saint Méen d’abbatre les bois de haute
 “ futaye de l’abbaye. Arret du p. de
 “ Bretagne, du 27. Septembre 1554. Le
 “ bois est réputé haute futaye qui est agé
 “ de plus de 100 ans †.”

O B S. IV.

Sunday.

OUR laws and customs, with respect to the observation of the Sabbath,

* Dict. des arreſts, voce *Bois*, v. 1. p. 296. n. 26.

† Ibid. p. 297. n. 58.

have

have fluctuated not a little, and at present seem not very consistent.

Fairs and markets were anciently held on Sunday. This practice is indeed discharged by 1503, c. 83.; but it crept in again not long after; and by 1540, c. 122. Sunday, Monday, and Thursday, are declared to be market-days in the town of Edinburgh. The weekly market of the burgh of Forfar was likewise held on Sunday; but, by 1593. c. 195. Friday is substituted in place of it. Several latter statutes have again and again forbid fairs or markets to be held on Sunday, and they have been obeyed.

By our old law, summonses could not be executed on Sunday*; but by act of federunt, 23d Nov. 1613, “ Instead of
“ letters of four forms, letters of horning
“ being introduced upon decreets of the
“ court of session, the charge is appointed
“ to be given either personally, or at the
“ party’s dwelling and parish-kirk conjunctly, upon a Sunday forenoon, in

* See Abridg. of the statute law, voce *Sunday*.

“ time

“ time of preaching or prayer, whereof a
 “ copy shall be left upon the most patent
 “ door.” By 1644, c. 14. letters of
 caption cannot be executed on days ap-
 pointed for solemn fasts and thanksgiving,
 during the time of divine service; but
 warnings, inhibitions, requisitions; and o-
 ther letters, may be read on Sunday*.
 Poindings, and other executorials, cannot
 be gone about on holidays, by 1469, c. 34.;
 yet, even at this day, messengers execute
 warnings, and make intimation of sales, on
 Sunday, at the church-door; and there and
 then rouns, strayed cattle, and other lost
 things, are proclaimed. So that we have
 not carried the matter so far as the Roman
 law: “ † Dominicum itaque diem ita
 “ semper honorabilem decernimus, et ve-
 “ nerandum, ut a cunctis executionibus
 “ excusetur; nulla quemquam urgeat ad-
 “ monitio: nulla fidejussionis flagitetur ex-
 “ actio, taceat apparitio; advocatio deli-

* Abridg. voce *Execution*, p. 86. But com-
 pare here the decisions in the dict. voce *Sunday*.

† L. 11. c. de feriis.

“ tescat;

“ tescat: sit ille dies a cognitionibus alie-
 “ nus: præconis horrida vox filescat; respi-
 “ rent a controversiis litigantes, et habeant
 “ fœderis intervallum: ad sese simul ve-
 “ niant adversarii non timentes, subeat
 “ animos vicara pœnitudo: pacta confe-
 “ rant, transactiones loquantur. Nec hujus
 “ tamen religiosi diei otia relaxantes, ob-
 “ scœnis quemquam patimur voluptatibus
 “ detineri. Nihil eodem die sibi vindicet
 “ scena theatralis, aut circense certamen,
 “ aut ferarum lachrymosa spectacula; et, si
 “ in nostrum ortum aut natalem celebran-
 “ da solennitas inciderit, differatur *.”

As we suffer notification to be made, on
 Sunday, of sales, warnings, rousps, &c.
 which can never be thought works either
 of necessity or mercy, one would think,
 that a farmer might, without giving of-
 fence, sow the ground, or lead home his
 corns, on a Sunday, that happened to be a
 good day for such work: but, in all pro-
 bability, he would be exclaimed against as

* Our law has adopted this last regulation;
 for when birthdays, &c. fall on a Sunday, the pu-
 blic rejoicings are delayed till the next day.

a Sabbath-breaker; nay, such work, however necessary, seems to fall under the act 1579, c. 70.; which ordains, “ That na
“ handie-labouring nor woorking be used
“ on the Sabbath-day,” without making an exception. Here too the Roman law differs from ours. “ * Omnes iudices,
“ urbanæque plebes, et cunctarum artium
“ officia, venerabili die Solis quiescant.
“ Ruri tamen positi agrorum culturæ libe-
“ re licenterque inserviant: quoniam fre-
“ quenter evenit, ut non aptius alio
“ die frumenta fulcis, aut vineæ scrobi-
“ bus mandentur, ne occasione momenti
“ pereat commoditas cœlesti provisione con-
“ cessa.”

O B S. V.

Tutor-dative.

HEineccius observes, that “ juris-
“ consulti Romani tutelam consi-
“ derabant tanquam hereditatem. Quem-

* L. 3. c. eod. tit.

“ admodum

“ admodum ergo testamento scriptus he-
 “ res, excludit legitimum, qui alias ab in-
 “ testato successisset; ita testamentaria tu-
 “ tela reliquas omnes, id est, legitimum et
 “ dativum, excludit. Et quemadmodum
 “ aliquando prætor bonorum possessionem
 “ dat, secundum vel contra tabulas; ita
 “ et deficiente tutela testamentaria vel le-
 “ gitima, tutorem dat prætor *.”

In like manner, we may run a parallel
 betwixt succession and tutory in our law.
 As the heir at law must yield the inheritance
 to him whom the choice of the proprietor
 has preferred, so must the tutor at law
 yield the office of tutory to him to whom
 the deceased has thought proper to intrust
 it; as the heir at law cannot be disap-
 pointed but by a deed executed in
liege poustie, so neither can the tutor
 at law be excluded on deathbed. And it
 would seem, that, without straining, we
 may carry the comparison a little further:
 for, if the defunct has no heir at law, and
 has not adopted, by a settlement, some
 stranger for his representative, the King

* Inst. § 203.

t

is his *ultimus heres*. Just fo in tutory; if there is no tutor at law, and none has been nominated by the father, the tutory devolves upon the king; who gives a tutor *tanquam ultimus heres*, and not as father of his country, as is commonly faid. For if this gift of tutory proceeded from his Majesty, not as *ultimus heres*, but as *communis pater* or *major magistratus*, the tutor-dative would be free from the neceffity of finding caution*, which is not the cafe.

This notion concerning tutors-dative, is confirmed by a decifion, abridged in the dictionary † under *Solidum et pro rata*, in thefe words: “ The mortification of an
“ hospital, carrying a power to three per-
“ fons named, or any two of them, to ad-
“ minifter and manage; and now, two of
“ the three being dead, the Lords found
“ the adminiftration of the hospital to be
“ like a tutory, and that it accrued to the
“ furvivor by the death of the other two
“ adminiftrators, notwithstanding the faid

* § 1. *Inf. de fatisfdat.* † II. 388.

“ words of the mortification: and found,
 “ that after the third should also decease,
 “ the nomination belonged to the heirs of
 “ the mortifier; but because, in the pre-
 “ sent case, the mortifier was a bastard,
 “ and so had no heirs, that here it belong-
 “ ed to the king as *ultimus heres*.”

O B S. VI.

Minor with curators.

IT is an established point, That though a tutor should let his pupil's estate, for ever so many years, yet the tack is coeval with his office, and must expire along with it, when the years of pupillarity are elapsed. But it may be doubted, if a minor, with consent of his curators, can grant a lease of his estate, to endure for years after the curatory shall be ended. Lord Stair, Lord Bankton, Mr Erskine, &c. tell us, without making any distinction, that tutors and curators cannot set tacks, to last longer than their office; and the authority

thority of Craig * supports this opinion. Yet it may be thought, that as a minor, with consent of his curators, can sell his land, *etiam sine decreto prætoris*, much more can he grant tacks, to continue in force after his majority; because *cui plus licet, id quod minus est non debet non licere.*

O B S. VII.

Minor without curators.

MR Erskine says †, there are but two cases, in which curators are imposed upon minors, 1. Where they are named by the father himself, in consequence of 1696, c. 8. 2. Where the father is alive; for he is *ipso jure* tutor and curator of his children. But curators seem to be imposed on minors, in another case, and by another statute, viz. 17. Geo. II. *An act for the raising and establishing a fund for*

* Lib. 11. tit. 10.

† I. 6. 7.

*provision for the widows and children of the ministers of the church of Scotland. Inter alia, this statute enacts *, " That the payments shall be made to the widows or children respectively named in the warrants, if the persons so named are majors; and to the tutors and curators of such of them as are minors; and if they have no tutors nor curators, to such person or persons as shall be authorised for that purpose, by an act of the presbytery or university respectively, of which the person under whom the provision is claimed, was last a member."* From this clause it is evident, that, in the opinion of the legislature, payment made to a minor without curators, liberates the debtor, only *quatenus in rem versum* of the minor, as by the Roman law.

* § 11.

O B S. VIII.

A case.

DIrleton, *voce Curator*, doubts, “ A fe-
 “ male minor being married, if the
 “ office of her curatory doth expire.”
 Stewart answers, “ It is certain the office
 “ doth not concern her person; and there-
 “ fore it comes to be *in potestate mariti*.
 “ The husband also gets a right to her
 “ moveables *jure mariti*; which is a legal
 “ assignation of them, as if the curator had
 “ consented to it. But as to her other
 “ estate or *bona*, the curatory stands.”
 This is a very blundering answer; for no
 position in law is more indisputable, than
 that a wife cannot administrate either her
paraphernalia or heritable estate, without
 her husband’s consent, who becomes her
 curator, as soon as she becomes his wife,
 and may call her former guardian to ac-
 count. Hence it is plain that marriage ex-
 auctorates the first curator.

But it may be further queried, If a hus-

band dies leaving a minor wife, does the curatory to which she was subject before wedlock, revive upon the husband's demise, as having been only in abeyance while the marriage subsisted? Voet * gives a very good solution of this question, "Viduum neque in patriam neque in tutoriam recidere potestatem; cum enim utraque legitimo sit extincta modo, patria quidem per nuptias subsequens, tutoria vera simulque maritalis per mortem mariti; et quod jure finitum est, non nisi certis modis a lege præfinitis, posse de novo instaurari ratio dicitur." She therefore may either re-elect her *quondam* curator, or chuse some other person, or act without any curator at all; her deeds being still reducible on minority and lesion; for marriage cannot accelerate the years of minority, or give her a *venia ætatis*.

Voet's maxim, That *patria et tutoria potestas solvitur nuptiis*, holds not universally with us: for if both husband and wife are minor, the father or curator of the

* Comm. ad tit. de adopt. n. 14.

wife loses his power over her, because the nature of marriage requires, that she be *in potestate mariti*; but the father or curator of the minor husband retains his power. See the case, *November 1683, Lady Ballegerno*, observed by Home, and abridged in the dict. vol. 2. p. 222. *in fine.*

O B S. IX.

Tutrix.

“ **G** IF the mother be made and consti-
 “ tute tutrix-testamentar to her
 “ bairn, and defaills hir body by forni-
 “ cation, or committing of adultery with
 “ ony man, scho forfaultes and tynes the
 “ office of tutorie, and the narest agnat
 “ to the pupill succidis in hir place as tu-
 “ tor of law; 14th Junii 1557, *the Laird*
 “ *of Largo contra Elisabeth Moneypen-*
 “ *nie *.*”

Lord Bankton seems to disapprove of this

* Balfour, p. 116.

decision.

decision. "A woman (says he *) by marriage falls from the tutory, because she becomes under curatory herself, which does not take place in the case of her incontinency." One would think that a judge, in determining this question, ought not to be a little influenced by the sex of the child. If the pupil is a male, the mother may be allowed to continue in the office. But if the pupil is a female, undoubtedly she ought to be stripped of it. For an imitation of the mother's irregular life, would be infinitely more prejudicial to the girl than to the boy. And though non-age may save her from being actually debauched; yet, by reason of it, she must be an easy prey to the contagion of example. However, it is not improbable that the amorous tutrix would be removed in both cases by the court of session. For an *accusatio suspecti tutoris* might be laid on l. 8. de susp. tut. "Suspectum tutorem eum putamus, qui moribus talis est ut suspectus sit." Or on l. 8. 9. 10. ff.

* I. 170. 30.

de conf tut. " In confirmando tutore,
 " hoc prætor inquirere debet, an duraverit
 " patris voluntas; nam si vel *morum ante*
 " *celata vel ignorata emerferit improbitas,*
 " aut inimiciæ cum patre exarserint, utili-
 " tatem pupillorum prætor sequitur, non
 " scriptorum testamenti vel codicillorum."

O B S. X.

A case.

A Woman nominated tutrix, by her deceased husband, to their common child, continued a widow, and acted as tutrix for some time; but was at length married to a second husband, during whose life she was not called upon to account for her intromissions. But after his death, and her marriage with a third husband, the pupil brought his *actio tutelæ* against her. The Lords of Session have had two such cases before them, and in both they decerned against the third husband; but found he was intitled to relief from the representatives of the second. See *March*

March 28. 1629, *Matthieson*; and February 18. 1663, *Dunbar*. The *ratio decidendi* is not assigned by the collectors of these decisions; nor yet by Lord Stair, who, in his *Institutions* *, approves of the doctrine which they seem to inculcate. What might have been the reason upon which these two judgments were founded, it is not easy to conjecture: but there is good reason for doubting if they are just. Mr Erskine † holds it to be law, That
 “ the husband is not considered as the true
 “ debtor in his wife’s debts; in all ac-
 “ tions for payment, she is the proper
 “ debtor; the husband is only cited for his
 “ interest, that is, as curator to her, and
 “ administrator of the society-goods: as
 “ soon therefore as the marriage is dissol-
 “ ved, and the society-goods thereby suf-
 “ fer a division, the husband is no further
 “ concerned in the share belonging to his
 “ deceased wife, and consequently is no
 “ longer liable in payment of her debts.”
 This reasoning applies directly to the a-

* Lib. 1. tit. 4.

† I. 6. 9.

bove-quoted decisions, which would have been more agreeable to the principles of law, had the woman's third husband been found liable without any reservation.

O B S. XI.

Marriage.

LOrd Stair * ranks among the persons whom the law will not allow to marry, "infants and those under age, who are not come to the use of discretion, unless *malitia suppleat etatem*; yet (he adds), seeing marriage is a natural obligation, and not annulable by positive laws, as to it regard must be had, whether the parties be truly come to discretion and capacity, whereof the commixtion of bodies is sufficient evidence." But it ought to be observed, that the marriage of pupils is forbidden, not solely because they are incapable of conjugal love;

* Lib. II. tit. 10. p. 26.

but

but also because they are incapable of the consent requisite to marriage, which is a contract. This presumption of incapacity is *juris et de jure*, and cannot be redargued by a contradictory proof. If commixtion of bodies is, as his Lordship will have it to be, sufficient evidence of capacity; surely the Lords of Session were very much mistaken in the case of one Blair *, whose idiocy they declared, and whose marriage they annulled, although he had a child by the woman who pretended to be his lawful wife.

O B S. XII.

Of the paternal power.

THE limits of the paternal power are not settled by our law, or our lawyers, many of whom are very far from talking with precision on this subject. Lord Stair says, “ That parents may keep their “ children at home, and oblige them to

* 1748.

“ work

“ work for the common interest of the fa-
 “ mily ; and what thence arises, is the pa-
 “ rents, and not their own ; which doth
 “ always endure, till, by consent of the
 “ parents, they become forisfamiliate*.
 But there seems to be good reason for
 doubting of this doctrine. The father is
ipso jure tutor and curator to his children.
 So far the law is clear. And it is a conse-
 quence, that the power of the father ter-
 minates when the tutory and curatory ex-
 pires, that is, when the children attain the
 age of twenty-one years; for after that pe-
 riod they may contract and do other deeds,
 without the father’s consent : and therefore
 it may be thought, that they are emanci-
 pated by the law, when they arrive at that
 time of life. And thus the law stands ac-
 cording to the late Institute. “ This au-
 “ thority of the father concerns chiefly
 “ the children while in nonage; but even

* Lib. 1. tit. 5. § 6. In this passage Lord
 Stair makes no difference betwixt the father and the
 mother, which is an inaccuracy. The power of the
 mother seems to have been not inferior to that of
 the father by the Jewish law. See Deut. xxi. 18.
 & seqq.

D

“ after

“ after they are of full age, he may com-
“ mand subjection to himself, as head of
“ the family, and has right to their ser-
“ vice, for their entertainment, if they are
“ not able otherwise to recompense him;
“ but he cannot, in virtue of this power,
“ detain them in his family against their
“ own will, after their pupillarity, at
“ which age they have a power of living
“ where they please, in the same manner
“ as other minors under curators.”

Dirleton (*voce Emancipation*) doubts,
“ if, by our law, children after twenty-five
“ years, may emancipate themselves, and
“ live by themselves, and leave their fa-
“ ther and his family? *Cogitandum*, Whe-
“ ther if they go out of the family with-
“ out the father’s consent, they may claim
“ a bairn’s part?”

Stewart answers, “ It is thought, chil-
“ dren cannot emancipate themselves;
“ and that if they leave their father and
“ his family, without his consent, they
“ should be refused a bairn’s part; for
“ the separation should make against them,
“ and not for them: yet it can hardly be
“ determined,

“ determined, what the non-emancipation
 “ in this case should signify to their pre-
 “ judice.”

It is pretty certain, that such child
 would be intitled to the legitim. It is in-
 deed true, that no forisfamiliarized child is;
 but no child is understood to be forisfamili-
 ated, unless he has received or renounced
 the legitim. This is very distinctly laid
 down in the late Institute, which talks
 more explicitly and consistently upon this
 point, than any other of our law-books.
 The words of it are. “ Notwithstanding
 “ that children, by separate negotiations,
 “ and by marriage, are understood in some
 “ views to be emancipated, as above; yet,
 “ as to certain effects, they are still regard-
 “ ed as of their father’s family; particu-
 “ larly as to the legitim or filial share,
 “ vulgarly called with us their *bairns part*
 “ *of gear*, to which they have still right,
 “ unless they have renounced it: and they
 “ are then said to be forisfamiliarized, even
 “ though they still remain in family with
 “ him *.”

* I. 155. 12.

O B S. XIII.

De heredibus instituendis.

“ **S**I quis nomen heredis quidem non
 “ dixerit, sed indubitabili signo eum
 “ demonstraverat, quod pene nihil a nomi-
 “ ne distat, non tamen eo quod contume-
 “ liæ causa addi solet, valet institutio; l.
 “ 9. § 8. ff. de her. inst. Voet express-
 es the sense of the law in this manner.
 “ Institutio pro non facta habetur, si he-
 “ redes instituantur tali designatione aut de-
 “ monstratione, quæ contumeliæ causa ad-
 “ di solet *.”

Perhaps we would do well to distinguish here. If, from other words than those which contain the contumelious designation, it be clear what person the testator had in his eye, the institution ought to be deemed valid, because expressions as well as conditions *contra bonos mores*, ought to be held *pro non scriptis*. But supposing that

* Comm. ad h. t. n. 27.

non constat de persona, without the assistance of the contumelious designation; if it is injurious to the moral character of the institute, it ought to be fatal to the institution; because it would be *propriam allegare turpitudinem*, to sue for the inheritance. But if the contumelious designation is taken from some oddity in the person or manner, it really is no reproach*; and ought not to invalidate the institution. Without the help of this distinction, this part of the Roman law would not be suited to the genius of the people of this country, who are so remarkable at describing men by their deformities, that a *Scots mark* is another word for a natural defect.

O B S. XIV.

Passive title.

Would *gestio pro herede* be inferred against an apparent heir, from his

* See Matthæus de crim. p. 140. 141.

proponing compensation, when sued by any of his predecessors creditors? It may be thought that he would not incur a passive title by making this defence: for since payment of one debt does not constitute behaviour, and subject him to another; neither ought compensation; because *compensare idem est ac solvere**; and he who hath sworn to pay, may nevertheless, with a safe conscience, defend himself upon compensation. The Lords have found, “ That the proponing a defence of payment, or *such like*, was not such a deed as could infer the passive title of behaving, unless it were adminicled with intromission or other ways †.”

It is laid down for law in the late Institute ||, That a general service vests the subjects it carries so fully in the heir’s person, that though he dies before infecting himself, yet the next heir must serve to him: whereas in a special service, the heir’s retour dies with him; because until infect-

* L. 76. ff. de v. f.

† Dirleton, 20th Jan. 1675, Carfrae.

|| II. 328. 21.

ment is taken by the heir, the lands remain *in hereditate jacente defuncti*; but then the general service included in this special one, still subsists. From this doctrine, it would seem a consequence, that if a special service is carried on before a judge, within whose jurisdiction the lands do not lie, (which is a nullity in the special service); yet the general service included in it, would remain good; because a general service may be carried on before any judge-ordinary.

However, this reasoning does not seem to coincide with another position the same author maintains in another passage *. He says, " Though the heir of line serving
" in general, cannot be reponed against
" the service; yet I conceive, that if one
" serve himself heir in special to an estate,
" which afterwards upon an unforeseen e-
" mergency is evicted from him, he ought
" to be relieved. For example, if one
" believing, upon probable grounds, that
" the estate descended to him as heir of

* II. 351. 91.

" line,

“ line, serve himself therein as such; and
 “ which afterwards is found to have been
 “ provided to heirs-male, or on the contra-
 “ ry, and thereon his service is reduced;
 “ and in such case, the general service im-
 “ plied in the special, cannot subject the
 “ party; *for being consequential only to the*
 “ *special, it falls therewith.*” The general service is either distinct and separate from the special one; or it is accessory and consequential to it. On the first supposition, the general service ought to stand good in all the three cases above mentioned. On the other supposition, it ought in all the three cases to fall to the ground, along with the special service.

The relief which the author of the Institute gives him who has served himself heir erroneously, seems well founded, and agreeable to the Civil law. “ *Evieta hereditate per inofficiosi querelam, ab eo qui heres institutus esset, perinde omnia observari oportere, ac si hereditas adita non fuisset.*” L. 21. § 2. ff. de inoff. test. See also Voet Com. *ibid.* n. 18. And the very case which Lord Bankton puts,

puts, was determined in 1717, by the house of Peers, which reversed a judgment of the court of session to the contrary*.

O B S. XV.

Warrandice.

“ **W**HEN a sale of lands (says Mr
 “ Erskine†) proceeds on an one-
 “ rous cause, the granter is liable in abso-
 “ lute warrandice, though there should be
 “ no clause of warrandice; but in assign-
 “ nation to debts, no higher warrandice
 “ than from fact and deed is implied. *F.*
 “ 4th March 1707, *Riddle.*

It may be thought, that the warrandice implied in an assignation to a debt, and that implied in the sale of an estate, are precisely the same, the warrandice in both being equally absolute. When an assignation

* See the dict. under *Heir and executor.*

† II. 3. II.

to a debt contains no clause of warrandice, yet is there an implied warrandice; *verum esse nomen* that the debtor is obliged to pay; but not *bonum esse nomen*, that he is *locuples*, and has wherewith to pay. In the sale of lands, when no warrandice is expressed; yet it is implied, that the seller warrants the rights which he conveys to be good; and that by them the purchaser will have an indefeasible title to the estate: but he does not warrant the ground to be *locuples*, that is, fruitful, more than he does the debtor to be solvent. Should a man, in the assignation to a debt, warrant the debtor to be *locuples*, or in the sale of an estate warrant the land to be fruitful; he would not grant absolute warrandice, but *casum in se susciperet*; for the bankruptcy or solvency of the debtor, the fertility or barrenness of the ground, depend entirely upon accidental circumstances.

O B S. XVI.

Personal and transmissible.

IF the buyer pactions, That *ſi intra certum diem diſplicuerit, res ſit inempta*, and dies before the time he ſtipulated is elapſed; Voet * is of opinion, that this faculty is perſonal, and would not tranſmit to his heir. Perhaps the following diſtinction would not be amiſs. If it was neceſſary, in order to make a prudent bargain, that the buyer ſhould have a trial of the thing, for ſome time, as is the caſe in watches or other machines; it would ſeem, that his heir ought to be allowed to return the commodity, if he could ſhow, that, upon trial, it was found not to be worth the money demanded for it: but he ought not to be ſuffered to return it, upon a mere *Sic volo, Sic jubeo, Stat pro ratione voluntas*; becauſe *quia diſplicuerit*, is unqueſtionably

* Comm. ad tit. de contrah. empt. n. 26.

perſonal

personal and intransmissible. On the other hand, if one buys, under the above-mentioned paction, a picture or any thing else, the value of which depends altogether upon fancy, and dies before the time allowed him to repent is expired ; it would seem, that the heir cannot void the bargain, because the paction, in this case, could not be made but from caprice, or some personal motive ; whereas, in the other, no *bonus paterfamilias* will buy a watch or any thing of that nature, without being allowed some time to essay it.

O B S. XVII.

Ususfructus.

THE *fructuarius*, by the Civil law, cannot alter the house which he life-rents, though to the better. The reason why he is not permitted to change the house *in meliorem formam*, Gothofredus says, is, *ne urbs ruinis deformatur* ; and Voet has given

.
r
-
,
n
l
,
.
e
.
i

given a place to this absurdity, in his com.
on the title *de usufructu*.

As the *fructuarius* must *uti frui salva rei substantia*, the restriction he is under, as to the improvement of the house, is a necessary consequence of the limitation of his right; for no considerable meliorations can be made on a house, without varying the situation of the walls, partition, stair-case, or the like. Now, if the *fructuarius* had it in his power to alter them, he would not act as liferenter, but proprietor. The decision of the King of Prussia's Code *, upon this point, is in the following words.

“ Celui qui a l'habitation non plus que
 “ son locataire, ne peuvent faire des
 “ changemens dans la maison, dans les
 “ appartemens, &c. ni elever des nou-
 “ veaux edifices, ni aggrandir les appar-
 “ temens, ou faire des cloisons, quand
 “ même la maison seroit meliorée par-là :
 “ mais celui qui a l'habitation, est obligé
 “ de rendre la maison, l'appartemens,
 “ &c. dans la même état qu'il a reçu ;

* Liv. IV. tit. 9. § 8.

E

“ mais

“ mais il lui est permis d’y faire de ces
 “ choses, qui, sans changer la maison, lui
 “ servent d’ornement : il peut donc faire
 “ peindre ou blanchir la maison, paver
 “ les chambres de marbre, boiser et lam-
 “ brisser les appartemens.”

O B S. XVIII.

Heirs-female of provision.

THE solution of the question which Lord Stair states in the 15th paragraph of the title *Heirs* *, is extremely ingenious and subtle, and at the same time solid, but expressed in very dark and unperspicuous terms ; so that I flatter myself an attempt to elucidate it may be of some use, at least to beginners.

The question is this. Suppose a man, in the contract of marriage with his first wife, provides the child or children of the marriage to *L. 15,000* ; in the contract of

* Lib. 3. p. 460. 461.

marriage with a second wife, he provides the child or children of the marriage to L. 12,000; and in the contract of marriage with a third wife, he provides the child or children of the marriage to L. 6000: suppose also that of each marriage a daughter exists, and that their common father dies, and leaves behind him only L. 18,000: How much will each of them draw? The question is put by Lord Stair in these words. “ There is a case
 “ occurreth oftentimes amongst heirs-portioners, when several obligations and
 “ provisions are granted in their favour
 “ by the defunct; thereby, after his decease, they become mutual debtors and
 “ creditors, and sometimes these provisions exceed the estate. *Quid juris?* Whether do these obligations evanish and
 “ become extinct *confusione*, because the
 “ same persons become debtors and creditors, or whether they do all stand? and
 “ in that case, whether the first in order
 “ will be preferred; or if they all will be
 “ abated proportionally to the value of the
 “ heritage?”

His Lordship says, this is a case which occurs amongst heirs-portioners : but it would seem, that, properly speaking, this was not a question amongst heirs-portioners, but heirs-female of provision ; for heirs-portioners, as his Lordship observes in a preceding paragraph *, succeed by course of law, and are so called because they succeed not *in solidum*, but in equal portions ; whereas the heirs, of which his Lordship discourses in the paragraphs we are going to consider, though they may sometimes succeed in equal portions, yet do not succeed by course of law, but by the will of the defunct ; and it is the provisions made for them by him, that alone give rise to the difficulty.

In the entry, Lord Stair lays it down as a principle, That heirs-portioners are mutual debtors and creditors. The reason is, heirs-portioners, or heirs of provision, represent the defunct, and are liable for his debts, *pro portione hereditaria* ; that is, she who gets one half of the e-

* § 11.

state, must pay one half of the debts; she who gets one third of the estate, must pay one third of the debts; and so forth. From this too it follows, that each heir-portioner has not action against her co-heirs for the whole of her portion, but only for two thirds of it, because she herself represents the defunct in one third, and consequently her claim must be extinguished *pro tanto*. Each heir-portioner succeeds to one third of her portion as heir; but as to two thirds of it she is creditor, and has action for so much against her sisters. These principles must be kept constantly in view as we go along, because they are the very basis and foundation of the whole argument.

Lord Stair very justly supposes, there is little or no difficulty when the several provisions are equal amongst themselves: yet, as he afterwards touches slightly upon the cases in which they are so, and as the consideration of them may probably facilitate the explication of the cases in which they are not so, I shall examine all the different cases that can possibly happen; which

are four. In the first case, the provisions are equal amongst themselves, and equal to the estate; in the second, they are equal amongst themselves, but unequal * to the

* By unequal to the estate is meant, that they exceed the estate: for if we should suppose that the different provisions do not exhaust the estate, what is over after paying the several proportions, would, I apprehend, go to the sisters as heirs-portioners properly so called; that is, they would succeed to it *per capita*, and not in proportion to their provisions. It is true, that *provisio hominis tollit provisionem legis*; but as the will of the deceased does not appear as to the surplus, the law must take place. Upon this principle, the case handled by Voet, *com. ad tit. de her. inst.* falls to be determined. A man leaves his estate to three sons, by unequal portions, and dies. After his death a posthumous child, which he did not think of, is born; or another son whom he had imagined to have been lost at sea, returns. Voet justly asserts, that neither the posthumous nor the other son will be excluded, but that they would accrete to their brothers. He does not specify the sum they would draw; but from what has been said, it would seem, that, *e. g.* the posthumous ought to draw one fourth of the whole, as succeeding *ab intestata*; for he has nothing to do with the partial preferences the father has made amongst his other children.

estate;

estate; in the third, they are unequal amongst themselves, but equal to the estate; in the fourth and last, they are both unequal amongst themselves, and unequal to the estate.

In the first two cases Lord Stair says, whether the provisions become extinct by confusion or not, it is alike. In the first case, suppose each child to have been provided to *L.* 10,000, and that the estate left by their father amounts to *L.* 30,000; it is plain, that, in this case, their provisions become extinct by confusion; because they are mutual debtors and creditors, and here the debit and credit are commensurate. Let us try if the case would alter, upon supposition that each of them sued the other for two thirds of *L.* 10,000: it would not; for the first has action for two thirds of that sum against the second and third, the second has action for the like sum against the first and third, and the third has action for the like sum against the first and second.

In the second case, suppose each of them to have been provided to *L.* 10,000, and that the estate left by their father amounts

mounts only to *L.* 15,000 ; each of them will have *L.* 5000. So far this case is precisely the same with the former : so that if the eldest, after having got her *L.* 5000, should still insist against the other two for two thirds of her provision, she would gain nothing by it ; for the second would insist for two thirds of the same sum from the first and third, and the third would insist for two thirds of the same sum from the first and second. But in this case, if the father leaves a separate estate, and an heir of line, each of the heirs of provision would have action against him for her whole *L.* 10,000 ; because heirs of provision are creditors * with respect to the heir of line, or any other heir who represents the defunct, more properly than heirs

* “ A father may, notwithstanding a first marriage contract, settle a jointure on a second wife,
 “ or provide the children of a second marriage ;
 “ for such settlements are deemed onerous : but
 “ where they are exorbitant, they will be restricted to what is rational ; and in all such settlements
 “ where the provisions of the first marriage are in-
 “ croached

heirs of provision do. And hence it is easy to fee, why the Lord Stair approves of the decision; yet he condemns * the *ratio decidendi*, in the case of Aikmans.

Having thus discussed the two cases in which the provisions were equal, we come now to the cases in which they are unequal. Suppose then, which is the third case, the first to have been provided to 15,000, the second to 12,000, and the third to 6000; and that the estate amounts to 33,000, which is just sufficient to pay them. As it was established above, that one third of each heir-portioner's share is extinguished, it follows, that in this case

“ croached on, the heirs of that marriage have re-
 “ course against the father, in case he should after-
 “ wards acquire a separate estate, which may en-
 “ able him to fulfil both obligations. 27th January
 “ 1730, *Henderson. Erskine III. 8. 18.*

* After having quoted a case from Maitland, he adds, *Craig has a like case, but otherwise observed*; the meaning of which expression is not, that the decision was different; for it is precisely similar: but that there was a variation in an unessential circumstance. In the first case, there were but two, in the last there were three heirs-portioners.

the

the first has action against the second and third, only for *L.* 10,000; the second has action against the first and third, only for 8000; and the third has action against the first and second, only for 4000; because 10,000 is two thirds of 15,000, 8000 is two thirds of 12,000, and 4000 is two thirds of 6000. The first then has action against the second for 5000, but the second has a counter-action for 4000.

The first then is creditor to the

second in	—	—	5000
-----------	---	---	------

The second is creditor to the

first in	—	—	4000
----------	---	---	------

Balance due to the first	—	1000
--------------------------	---	------

The first is creditor to the third

in	—	—	5000
----	---	---	------

The third is creditor to the first

in	—	—	2000
----	---	---	------

Balance due to the first	—	3000
--------------------------	---	------

Thus then the first recovers from her two sisters *L.* 4000.

In the same way, the second has action against the third for 4000; on the other hand, the third has a counter-action against the

the second for 2000; so that the balance due by the third to the second is 2000; but as the second has been obliged to pay to the first 1000, her clear gain is only 1000.

As to the third, she has been obliged to pay to the first 3000, to the second 2000, in all 5000. Now, having adjusted their several demands, as creditors, let us divide the estate of L. 23,000 amongst them as heirs. Each will have one third of it, that is, 11,000.

The first then draws	—	11000
----------------------	---	-------

The second paid her	—	1000
---------------------	---	------

The third	—	—	3000
-----------	---	---	------

In all	—	—	—	4000
--------	---	---	---	------

Which makes her portion to
be what the father intended,

<i>viz.</i>	—	—	15000
-------------	---	---	-------

The second draws	—	11000
------------------	---	-------

Her clear gain amounted to	1000
----------------------------	------

Which gives her	—	—	12000
-----------------	---	---	-------

The

The third draws	—	—	11000
She paid the eldest	—	3000	
The third	—	—	2000
In all	—	—	5000
Which being subtracted from her portion, brings her share down to	—	—	6000

The fourth and last case is to be treated after the same manner. Suppose the provisions to be 15,000, 12,000, 6000, and the estate 18,000. In this, as in the former case, the first will recover 1000 from the second, and 3000 from the third.

In all	—	—	—	4000
--------	---	---	---	------

Which added to one third of the whole	—	—	6000
--	---	---	------

Brings out her share to be	10000
----------------------------	-------

The second will recover from her youngest sister 2000, of which she has paid 1000 to the eldest.

Thus her clear gain is	—	1000
------------------------	---	------

Which added to her one third of the whole	—	—	6000
--	---	---	------

Brings out her share to be	—	7000
----------------------------	---	------

The

The share of the third is also one third of the whole,

<i>viz.</i>	—	—	6000
Of which she has paid to the			
first	—	—	3000
To the second	—		2000
In all		—	5000

Which brings out her share to be

—	—	1000
---	---	------

Thus supposing the whole estate 18,000, their provisions are 10,000, 7000, 1000.

I have explained the circuit by which they recover their several portions, in a manner somewhat different from Lord Stair, because I thought his Lordship's not so natural and easy. His Lordship, in the last case, which is the only one he illustrates by an example, first sets off to each of them 6000, which is one third of the whole 18,000; and then still supposes the first to have action for 10,000 against her sisters, the second to have action in like manner for 8000, and the

F third

third for 6000. This comes to the same thing, but seems, at first view, a little perplexed.

This distribution, by which the provisions are 10,000 to the first, 7000 to the second, and only 1000 to the third, may be thought unjust, and not at all analagous to the will of the father. It may be thought, that in this case, where the provisions are 15,000, 12,000, 6000, and the amount of the estate only 18,000, that the provisions should decrease in the *ratio* of 33 to 18; that is, the 18,000 should be divided into 33 parts, 15 of which should be given to the eldest, 12 to the next, and 6 to the youngest; and in this way their shares turn out to be as follows.

		<i>l.</i>	<i>s.</i>	<i>d.</i>
Share of the first	—	8181	16	4.36
Share of the second	—	6545	9	1.10
Share of the third	—	3272	14	6.54

However, there is, according to Lord Stair, no remedy against the above inequality, when the sisters are *heirs*; but there is, if they are not under a necessity of serving,

serving, but may take their provisions as creditors, without representing the defunct. Whether they can do so or not, depends upon the respective contracts of marriage. See, as to this point, the dict. of decis. under *Provisions to wives and children*, and the reasoning in the decis. observed by Mill. n. 181. p. 268.

If the sisters are not obliged to serve heirs, Lord Stair points out a remedy in this manner. " Such of them (says he) as
 " find themselves losers if they enter
 " heirs, may abstain and renounce; and
 " they, or their assignees, may pursue
 " any of the rest that shall enter, for fulfilling of the defunct's obligations:
 " but if they be considerate, when all the
 " obligations jointly exceed the value of
 " the estate, they will all renounce, and
 " assign their obligations, and their assignees will be preferred according to their
 " diligence, without consideration of the
 " priority or posteriority of their obligations: but when they happen to enter,
 " or their provisions necessarily require
 " that they must be heirs," &c. In the

same way Lord Bankton. * “ If any of
“ them renounce, or abstain from the suc-
“ cession or inheritance, action is compe-
“ tent at her instance against the rest for
“ their proportions; and she may adjudge
“ in the name of a trustee, upon a decree
“ *cognitionis causa*, against herself for her
“ own proportion, and against the rest as
“ to their proportions, on decrees of con-
“ stitution as other creditors.” Thus, in
the above case, if the provisions are
15,000, 12,000, 6000, and the estate
amounts only to 18,000; it is clear the
youngest ought not to enter heir if she
can avoid it. If her sisters must enter,
or inadvertently do enter without any
necessity, she may follow the method
chalked out by Lord Bankton; and, in a-
ny of these shapes, she will not be liable
to any counter-claim from her sisters, be-
cause she does not in any wise represent
the defunct, upon which footing alone she
lost L. 5000 above, but is as any other
creditor. Lord Stair says, if they be consi-
rate, they will all renounce; if they do,

* Inst. II. 349. 83.

and adjudge, and are brought in *pari passu*, then their shares will be settled in the more equal and equitable way hinted above; that is, their shares will be 8181, 6545, 3272, not counting the odd money.

Lord Stair concludes with determining the case in which it is supposed that a father has provided the same land-estate to the children of three different marriages successively. If the nature of the contracts require that the children serve, there is no difference betwixt this case and those illustrated above; each of them would have one third of the land, that is, they would be heirs-portioners. But since the act 1621, his Lordship says, that “ the first
“ disposition or provision, constituting that
“ party creditor, may give ground to re-
“ duce a posterior disposition of the same
“ thing to another of the heirs-portion-
“ ers, as being without a cause onerous,
“ after contracting of the first debt: but
“ that will not hold in bonds for sums of
“ money, all which have their effect as
“ aforesaid: neither will it hold when the
“ provision of lands provideth the party
F 3 “ destinate

“ destinate to be heir ; for thereby the
“ party cannot quarrel that predecessor’s
“ deed.” What Lord Bankton * delivers
as his opinion on this point, will throw
some light upon this passage. “ Where
“ a man, by inadvertency, provides the
“ same estate to the heirs of a second
“ marriage, that was provided formerly
“ to those of the first ; in such case I
“ conceive, the heir of the first marriage
“ is intitled to reduce the provision in the
“ second contract as fraudulent. At the
“ same time, the father might have made
“ suitable provisions to the wife and chil-
“ dren of the second marriage, to which
“ the heir of the first would have been
“ liable, in default of other funds than
“ the estate provided to him ; and, conse-
“ quently, the court may, in my appre-
“ hension, modify suitable provisions to
“ them out of the estate in such case, and
“ reduce the right only upon payment of
“ the sums modified ; or the pursuer may
“ be burthened in the decree therewith.”

It may be thought, that one marriage

* II. 349. 86.

of which two or three children exist, may give rise to this question above illustrated, as well as three marriages, of each of which children exist. *E. g.* a man, in his contract of marriage, provides the children of that marriage to 33,000. The father has the power of proportioning this sum amongst his children, by what shares he thinks proper. See Erskine, lib. 3. tit. 8. § 19. Now, suppose he allots the eldest 15,000, the second 12,000, and the youngest 6000: Would not the above doctrine from Lord Stair apply to this case too, if he died leaving only 18,000?

It has been already said, that heirs portioners or of provision are liable *pro portione hereditaria*. Now, suppose the provisions to be 15,000, 12,000, 6000, and that the defunct leaves bonds, bills, or money, to the extent of 33,000, but at the same time leaves 15,000 of debt: The children would recover their provisions as in the third case above explained; for you must not deduce the debts which amount to 15,000, and thus reduce the estate to 18,000, and then divide it amongst them as in case fourth. The children

dren are liable *pro portione hereditaria*. Their portions are 15,000, 12,000, 6000; the 33,000 left by their father is sufficient to pay them. The creditors will indeed have action against them *pro portione hereditaria*; that is, supposing the debt to be 16,000, as above, the first will be liable in $\frac{15}{33}$ parts of it, the second in $\frac{12}{33}$ parts, and the third in $\frac{6}{33}$ parts. Their shares of the debts then turn out thus.

The first is liable for	6818	3	7.63
The second for —	5454	10	11.24
The third for —	2727	5	5.13

So that in this case their shares will be the same as if the 18,000 had been divided into thirty-three parts, of which the eldest got fifteen, the second twelve, and the youngest six. For

The eldest's share of the			
estate was —	15000	0	0
Out of which she is liable in payment of			
debts —	6818	3	7.63

So that her clear gain is only — —

8181 16 4
The

Obf. 18. *some points of Law.* 69

The share of the second

was — 12000 0 0

Out of which she is lia-

ble for — 5454 10 11.24

So that her clear gain is
only —

6545 9 1.1

The share of the third

was — 6000 0 0

Out of which she is lia-

ble for — 2727 5 5.13

So that her clear gain is
only —

3272 14 6.54

In fhort, in every cafe, whatever be the estate left by the defunct, it falls to be divided as above; and after the *portiones hereditarie* are fixed, the creditors may fue each of them to that extent. But at this rate, though he who leaves behind him *L.* 33,000, and at the fame time *L.* 15,000 of debt, in reality dies no richer than he who leaves only *L.* 18,000 without any debt; yet we have feen there

there is all the odds in the world betwixt these cases as to the provisions of his daughters. For in case he leaves 33,000 and 15,000 of debt, the shares of his daughters are 8181, 6545, 3272, not counting the odd money. But in case of his leaving only 18,000, and no debt, it has been shown above, from Lord Stair, that the shares of the daughters would be 10,000, 7000, 1000. In both cases he dies equally rich; and there would have been no difference betwixt the two, had he been succeeded by any other representatives than heirs-female of provision.

O B S. XIX.

Arbiter.

BY the Civil law, a woman cannot be an arbiter: but Heineccius says *, that in those countries where women are

* Tit. de receptis.

allowed

allowed to hold lands and heritable jurisdictions, they will not labour under any such incapacity. If women who have heritable jurisdictions could judge in person, there would be something in the argument; but a lady possessed of lands which have jurisdictions annexed to them, and which intitle the proprietor to a vote in the election of a member of parliament, cannot exercise any of these privileges herself. She behoved to appoint a depute, to determine causes within her territory; and her vote must lie dormant, till she get a husband, who may demand to be inrolled in her right. So that this argument makes against the doctrine Heineccius intended it should support.

Submissions by the Civil law are at an end, upon the death of any of the parties, unless their heirs be expressly mentioned; and this seems to be understood to be our law; but it is not easy to see, upon what principle this notion is founded. Mr Erskine says *, “ Submissions, like man-

* IV. 3. 16.

“ dates,

“ dates, expire by the death of any
 “ of the parties submitters. See 25th
 “ *February 1630, Hay **.”

But submissions have no resemblance to mandates. The constituent can revoke the mandate, during any period of his life; and consequently, when he dies, the maxim, *Voluntas morte finitur*, must immediately put an end to the mandate, the subsistence of which depended entirely upon the continuance of his will, which is now no more. Whereas none of the parties who enter into a submission, can revoke or refile from it, during their lives. Why then should it vanish upon the death of either one or t' other?

O B S. XX.

Mandate to a lawyer.

VOet maintains, that he who has received a mandate to carry on a process

* Upon looking into this decision, you will see this was not the point decided.

before

before an inferior judge, cannot appear himself, or employ another to plead for his constituent, before a superior court, unless his mandate expressly impowers him to do so. His reason is, That *mandatum finitur perfecto negotio, et finitum censetur procuratoris officium, æque ac judicis post latam sententiam* *.

But it may be thought, that when a man gives a mandate to a procurator, to bring an action in his name, before the sheriff, or other subordinate judge, it is his intention, not only that his procurator should obtain sentence in his behalf, (for what signifies a sentence when the effect of it is stopped?), but that he should recover his money, or whatever else he sues for. Until this is accomplished, the business with which the procurator was intrusted, cannot be reckoned at an end.

* Com. ad tit. de procur. n. 18.

O B S. XXI.

Advocations.

IT has been found, “ That an advoca-
 “ tion cannot be received after sen-
 “ tence, though before extract; because
 “ *sententia definitiva est ultimus actus ju-*
 “ *dicis*, and the extract is but the clerk’s
 “ part *.” But, by our present practice,
 advocacy is competent any time before
 extract.

The decision just now quoted, seems to
 have gone upon the notion of the commen-
 tators on the † Civil law; by whom *sen-*
tentia dividitur in interlocutoriam et defi-
nitivam; the last of which determines the
 whole cause, and cannot be varied by
 the judge; the first, only some inci-
 dental question, and may be altered. This
 doctrine does not tally with the constitu-

* Stair, 10th July 1662, Lammerton.

† Voet com. ad tit. de re judic.

tion of our courts: for with us, after pronouncing an interlocutor which exhausts the whole cause, the judge is not *functus*: the party who thinks himself aggrieved, has it in his power to reclaim before extract; and consequently the judge has it so long in his power to rectify his decision, if, upon reconsideration, he finds it erroneous.

The acts 1663, and 21. Geo. II. relate only to processes *for sums of money*; whereas the regulations 1672 provide, That all causes “ not exceeding *the value* “ of 200 merks Scots, be, in the first instance, carried on before the inferior “ judge.”

There is a great difference betwixt the expressions, *the value*, and *for sums of money*. Yet it cannot be thought, that the regulations meant to derogate from the act 1663: for, in the very next paragraph, they add, “ No advocacy thereof shall “ be passed, being of no greater importance than as aforesaid, otherwise than “ is provided by *the act of parliament*.” Therefore, as the law stands at present,

processes for restitution of the *ipsa corpora*, of the most trifling moveables, may be advocated to the court of session, because they are not for *sums of money*; though this consequence seems to be contrary to the spirit of the act 1663; the intention of which appears, from the preamble, to have been, that the Lords of Session might not waste their time on trifles: and yet, if the advocacy of all processes not exceeding the *value* of twelve pounds was discharged, how would their value be ascertained if controverted? It would be impossible to ascertain it; for people have often an affection for the *ipsa corpora*, which is inestimable.

O B S. XXII.

Votes.

THere is nothing more common, than for a man to vote for himself in elections: but it would seem to be a great abuse; for every elector is a judge, (hence the

the court of session found, that a minor could not vote as a commissioner of supply *, at the election of a collector of the cess); and to allow him to give judgment for himself, is a palpable absurdity.

Is the preses of a meeting or court intitled to two votes, or only to one? It is not easy to fix the principle upon which this question ought to be solved. It would seem, that when a member of a meeting or court is chosen preses by his compeers, he ought to have two votes, one as a constituent member of the court, and another *ex necessitate*, as preses, in case of an equality; because *nemini officium suum debet esse damnosum*: but if he is not chosen by the meeting or court, but named by some third party, or even altho' he is chosen by the meeting or court; yet if by this election he be vested with no particular privileges, he ought only to have a vote in case of an equality.

According to this theory, the president

* 25th July 1735, Hay.

of the court of session, the provosts of burghs, and the principals of colleges, ought only to have a vote in case of equality. On the other hand, the moderator of the general assembly, and other ecclesiastical courts, the preses of the meeting of freeholders *, and commissioners of supply, the dean of the faculty of advocates, and the preses of every incorporation, ought to have two votes: but the practice in this matter is extremely vague and uncertain.

O B S. XXIII.

Res nullius.

BY the law of Scotland, things which never had an owner, *e. g.* pearls found on the shore of the sea, &c. *cedunt occupanti*; but things which once had an owner, and have none now, *cedunt Domino Regi*. What is the reason of the dif-

* He has two votes by 16. Geo. II.

ference?

ference? It seems to be this. Things which once had an owner, and have none now, go to the king as *ultimus heres* of the *quondam* owner. The foundation of *ultimus heres*, is the presumed will of the *quondam* owner, who, it is to be supposed, since his effects must fall to those with whom he has no connection, would rather they should go to his king than any other person. Thus the king is called to the inheritance, as being the person *quem defunctus quam maxime amasse censetur*; which is the first principle of succession. If things which once had an owner, shall be thought to go the king, not by succession, but by confiscation, as *bona vacantia*; it will not be easy to assign a good reason, why things which never had an owner should not go to him also, they being *bona vacantia* as well as the former.

It was lately found, That the king, as *ultimus heres*, was intitled to reduce a deed done to his prejudice by a bastard in *lecto*, 31st July 1753, *Gowdie*.

O B S. XXIV.

De periculo rei venditæ.

THE principles of the Roman law, as to this point, are explained by Heineccius in this manner. “In confesso est, et casum et commodum ex re ad dominum pertinere; nec minus certum est, dominium ante traditionem ad emptorem non transire. Attamen quum venditor teneatur ad tradendum, adeoque sit *debitor speciei, qui speciei interitu liberatur*, non potuit non inde nasci axioma, nondum perfecta emptione venditione, periculum et commodum rei venditæ pertinet ad venditorem, ea jam perfecta ad emptorem *.”

There is good ground for thinking this reasoning faulty and inconclusive.

After a contract of sale is perfected, there arises one action to the seller,

* Pand. pars 3. § 302.

for the price, and another to the buyer, for the specifical delivery of the thing sold, or else *ad id quod interest*: but these two actions are not distinct and unconnected; they must tally with one another; and neither party can demand implement from the other, till he has performed, or is ready to perform, the prestations incumbent on himself. Hence, if the seller, *e.g.* of a horse, sues for the price when he neither has delivered, nor is in a capacity to deliver the horse, the defence for the buyer is, *Exceptio rei venditæ nondum traditæ*. If the seller answers, the horse was killed by accident, and *debitor speciei speciei interitu liberatur*; the answer the buyer ought to make is this, Were I to bring my action against you, for specifical delivery of the horse, or else *ad id quod interest*, the defence, that the horse had perished, and therefore *debitor speciei*, &c. would be sufficient to elide that action; but it can never have the effect, to make me not only put up with the damage I have received, by the not delivery of
the

the horse, but also pay for him, as if I had received him.

According to this hypothesis, the maxims, That *res perit domino*, That *debitor speciei*, &c. That, in mutual contracts, neither party can demand implement from the other, till he himself has performed his part, so far from clashing together, are perfectly agreed. And thus the Roman law is stated by Africanus, in l. 33. d. locati. “ Si fundus quem mihi locaveris, “ publicatus sit, teneri te actione ex con- “ ducto, ut mihi frui liceat, quamvis per “ te non stet, quo minus id præstes. Quem- “ admodum, inquit, si insulam ædifican- “ dam locasses, et solum corruisset, ni- “ hilominus teneberis : nam etsi vendi- “ deris mihi fundum, isque, priusquam va- “ cuus traderetur, publicatus fuerit, te- “ nearis ex empto ; quod hætenus verum “ erit ut pretium restituas, non ut etiam “ id præstes, si quid pluris mea inter- “ sit eum vacuum mihi tradi. Similiter “ igitur et circa conductionem servandum “ puto, ut mercedem, quam præstiterim, “ restituas ; ejus scilicet temporis quo “ fruitus

“ fructus non fuerim, nec ultra actione ex
 “ conducto præstare cogaris.”

Cujacius * on this law observes, “ Ex
 “ quo intelligitur post perfectam venditi-
 “ onem periculum non respicere ad em-
 “ ptorem. Quod est contra id, quod vul-
 “ go dici solet; perfecta emptione pericu-
 “ lum omne pertinere ad emptorem, *l.*
 “ *id quod, et l. seq. de per. et com. rei*
 “ *vend.* Perficitur autem emptio nudo
 “ consensu, etiam re non tradita, aut pre-
 “ tio non numerato. Verum ita accipi-
 “ enda ea regula est, ut pereat res em-
 “ ptori, non pretium; id est, si res perierit
 “ ante traditionem, et perire videtur, quæ
 “ in publicum redigitur, ut pereat em-
 “ ptori, ne id quod interest supra pretium
 “ rei consequatur; non etiam, ut vel
 “ pretium non repetat quod solvit, vel
 “ quod non solvit venditoriolvere com-
 “ pellatur. Quod confirmat *l. quod si*
 “ *neq. de per. et com. rei vend.* quæ, lectis
 “ venditis, si ante traditionem eos ædi-
 “ lis plebis, cum in via publica positi es-

* Tract. 8. ad Africanum, opp. tom. 2. p. 561.
 sent,

“ sent, conciderit, venditoris periculum esse
 “ ait ; quia scilicet pretii petitionem non
 “ habet, quinimo restituet pretium si quod
 “ acceperit. Idem confirmat *l. ult. de*
 “ *cond. caus. dat.* quæ in permutatione
 “ ad exemplum emptionis, si data pecu-
 “ nia, ut daretur Stichus, perierit Stichus
 “ ante traditionem, pecuniæ repetitio-
 “ nem esse ait ; cum tamen constet, *ex l.*
 “ *naturalis*, § 1. *de præsc. ver.* non esse
 “ id quod interest Stichum tradi præ-
 “ scriptis verbis actionem. Idem etiam
 “ infra confirmabit *l. 39. de solut.*” He
 then proceeds to obviate the objections which
 are started from some other texts, which
 seem to contradict those on which he rests
 his opinion. But perhaps some interpre-
 ters are not in the wrong to infer from
 these discrepancies, that the Roman law-
 yers themselves were not unanimous as
 to this point.

We shall go nearer to the bottom of
 this subject, if we examine into the founda-
 tion of this maxim, *Debitor speciei, &c.*
 Puffendorff very justly remarks, that the
 texts of the Roman law from which this
 maxim

J
C
t
A
t
f
t
a
t

lo
ta
o
e
f'
ce
ab
la
l'a
du

maxim is gathered, ought not to be applied to mutual contracts, because they refer to gratuitous promises and legacies *. Strictly speaking there seems to be no foundation for this maxim; the rule of law being, that *loco facti impræstabilis succedit damnum et interesse* : so that abundance of favour is shown to the seller in this case, if he is secured from an action *ad id quod interest*. Perhaps it is equitable to go this length, in favour of the seller : for it might be thought hard, when the delivery becomes imprestable by mere accident, that he should not only lose the thing sold, but also be obliged to be so

* Il ne sert de rien d'alléguer ici quelques loix, qui disent que quand on a promis une certaine chose particuliere, et distinctement designée ou une chose en espece comme on parle ; on n'en est point garant, au cas qu'on la perde. Car il s'agit là de promesses gratuites : et en matière de ces sortes d'engagemens, il seroit certainement absurde et injuste que l'on fut tenu de donner, ou la chose même, ou la valeur ; la nature même de l'affaire ne souffrant pas une interpretation si étendue." *Droit de nature et des gens*, V. 5. 3.

H

much

much out of pocket to the buyer *. But if we carry our partiality to the seller any further, we must of necessity oppress the buyer. It is reasonable he should run the risk of the deterioration of the thing sold, because he has the chance of its melioration : But to load him, both with the risk of its deterioration and destruction, is to make the contract very unequal : for, at this rate, the buyer runs all the risks ; whereas the seller runs none

* Mr Erskine, III. 3. 3. says the subject sold perished to the buyer by the Roman law, " because the property in the vendor was considered to be but nominal, he being obliged to transfer it to the buyer." This reason is somewhat more specious. But if the *real* property was in the seller, there would be nothing peculiar in the doctrine *de periculo rei venditæ* ; for it is *triti juris*, that *res perit suo domino*. If the real property was in the buyer, he would not have merely a *personal* action against the vendor, in case of his selling it to another, but a *real* action *adversus quemcunque possessorem*, which is not the case ; so that this reason resolves into a *petitio principii*. However, the argument in this observation is pointed at those who found this doctrine on the maxim, *Debitor speciei, &c.*

at

at all, because the price, which consists of money, is a *genus*, and cannot perish. In short, a man who buys black cattle, sheep, or other specieses, must often be a very great loser, if they are not delivered to him in terms of the bargain. It is all one to him, whether he suffer this loss by the fraud, the fault, or the misfortune of the seller : so that, in strict law, he ought, in every case, to have damages. In the last indeed, it may be right to mitigate the rigour of the law, and only to allow the buyer retention or repetition of the price, according as he has, or has not paid it. But to say, that the seller must not only acquiesce in the damage he sustains, by being disappointed of the commodities he bought, but must also pay their price, as if they had been duly delivered to him, is manifest and flagrant injustice.

What is said *de periculo* in contracts of sale, ought also to hold in contracts of location : for “ it may (as Mr Erskine “ observes), without impropriety, be “ considered as a species of sale, in which

“ the subject sold, is the use or service,
“ and the price is the hire, which must
“ consist, as in a proper sale, of money.”
Accordingly we see Africanus, in the law
above quoted, runs a parallel betwixt
sale and location, as to this very point *de*
periculo. Let us suppose, then, this case
(which is precisely the same with the one
put by Africanus), that *A* lets a house to
B, which falls or is burnt before the term
of *B*’s entry; it is a consequence of the
common notion *de periculo rei venditæ*,
that *A* would be free *speciei interitu*, and
B liable for the rent. Or suppose that I
hire a particular horse, who dies or breaks
one of his legs before the day fixed for
my journey; it is likewise a consequence
of the same opinion, that the horsehirer
would be free, and I bound to pay the
hire. The same will hold, if I contract
with a painter for a portrait, or with a
musician for a piece of music, and they,
by some accident, become next day inca-
pable of their task.

These examples only serve to place the
absurdity of this doctrine in a more stri-
king

king light: for the absurdity is as real in sale as in location, the parity of reason being indisputable; and yet we are taught different rules as to this point in location, by Voet, ad tit. locati, n. 24. 27. and most other commentators.

Upon the whole, this doctrine, that *periculum transit ad emptorem*, when a species is sold, if it really is the Roman law, as all interpreters (one or two only excepted) assert, deserves well to be reckoned *inter nœvos jurisprudentiæ Romanæ*. It has not yet got footing in our law, and it is to be hoped, never will. Lord Stair expressly disavows it; and Lord Bankton lays it under such restrictions *, as make it

* As to the question, At whose peril the thing sold, after the contract of sale is perfected, is, if it perish by accident before delivery? the English lawyers, Bract. lib. 1. c. 27. give it as their opinion, that it is the seller's, because he remains still owner. But I conceive, that this rule must admit of the exception, that the goods must perish to the buyer, if it was his fault that the same were not delivered. For example, if a day is set for delivery, and the thing perish before the day; it is lost to the

it very good sense. The * law of England too has rejected it, and burdens the seller with the *periculum* of the thing sold, before delivery. Hence, if a man buys a house, which happens to be casually burnt before the time agreed for payment of the price, he will not, by a court of equity in England, be compelled to pay the same. Lord Bankton justly observes, that such purchaser with us would be liable for the price, if he got a proper and formal conveyance to the house, because then the property was transferred; but not if the bargain was struck only by a minute of sale†. In two cases mentioned in the dictionary, *voce Periculum*, the peril of a house sold, and thereafter

seller: but if there is no day for the delivery, the thing being sold for ready money, and, through non-payment of the price, the thing remains with the seller; or if, in the former case, the buyer does not, at the day prefixed, pay the price, and receive the thing sold, it must perish to him. Inst. I. 428. 26. See also vol. 1. p. 419. 36.

* Vin. (vender et vendee), p. 543.

† Inst. II. 243. 7.

burnt,

burnt, has been found to be the buyer's : but in the first case, it was so decided, because the buyer did voluntarily take possession and rebuild the house, and was infest before the burning ; and, in the other case, he was likewise infest, and the keys were offered to him. The *ratio decidendi*, in these cases, plainly indicated, that, in the opinion of the judges, had not the property been transferred, neither had the *periculum*.

O B S. XXV.

Servants buying in the name of their masters.

“ IF a master (says Wood*) always
 “ gives his servant ready money, he
 “ shall not answer for what the servant
 “ buys on trust ; but if he sends some-
 “ times on trust, he must answer his u-
 “ sual tradesmen for what is so taken up

* Instit. p. 56. initio.

“ upon

“ upon trust by him.” The French law too talks much to the same purpose on this point: “ Les maîtres ne sont point tenus
 “ de payer aux marchands ce que leur
 “ maîtres d’hôtel ou cuisiniers prennent
 “ pour la provision de bouche de leur maison, lorsque les maîtres affirment avoir
 “ donné toutes les semaines de l’argent
 “ pour leur dépense. *Arrêt du May 26.*
 “ 1691 *.”

As cases of this sort happen every day, it is surprising that we have no decisions upon this question †. I have been told, that

* Dict. des arr. vocé *Obligation*, tom. 11. p. 840. n. 102.

† There is, indeed, one decision, which, though it is not directly in point to the case in hand, yet, as the reasoning of the lawyers upon it is, I shall transcribe at large. It is observed by Lord Stair, 171*b* Nov. 1665, *Houison contra Cockburn*. “ The executors of David Houison pursue James Cockburn,
 “ for the price of several ells of cloth, which the
 “ said James, by his ticket produced, granted him
 “ to have received, in name and for the use of the
 “ Laird of Langtoun, his master. It was alledged
 “ absolutor ;

that the magistrates of Edinburgh have had many fuch cafes before them, and that

“ abfolvitor ; becaufe by the ticket the defender
 “ is not obliged to pay the cloth, and doth only aft
 “ in name of his mafter ; and therefore the mer-
 “ chant ought to have called for the account from his
 “ mafter within three years, which he has not done
 “ till many years long after his mafter’s death.
 “ It was replied, *That the ticket muft oblige him, at*
 “ *least docere de mandato ; for his doing in name of*
 “ *his mafter could not oblige his mafter* ; fo that if he
 “ was not fo obliged, the merchant lofes his debt,
 “ and no body is obliged. It was answered, *That he*
 “ *who acts with any mandatar, fhould know his com-*
 “ *mission ; and if he does not know it, it is upon his*
 “ *own hazard* ; but if the mandatar act not in his
 “ own name, but his mafter’s, he does not oblige
 “ himfelf : and if fervants, who receive in their
 “ mafter’s name, fhould be thus obliged to fhew
 “ their warrant, it would be of very evil confe-
 “ quence, feeing their account can be proven by wit-
 “ nefses, within three years, and their warrant
 “ would not be fo probable. The Lords found,
 “ That, *post tantum tempus*, the defender was not
 “ obliged to inftitute his warrant, but the fame was
 “ prefumed to have been known to the merchant ;
 “ unlefs it be proven, by the defender’s oath, that
 “ he acted without a warrant, or that he did not
 “ apply the cloth to his mafter’s ufe.”

they

they have followed much the same rule with that laid down by Mr Wood, of which the inhabitants seem to have approved.

It must be acknowledged, upon this point, that it is a difficult matter to pitch upon any general rule which shall not bear too hard either upon the master or merchant. Perhaps the rule observed by the magistrates of Edinburgh is very equal to both; but yet it may be doubted, if this rule would hold in case it were brought to a trial: and it may be thought, that here no general rule can be fixed; but that cases of this sort must be determined according to the special circumstances attending them. This will appear from considering more particularly the words of the above passage from Wood's institute. It is there said, if a master always gives his *servant*, &c.; but if one sends *sometimes upon trust*, not his *servant*, but any other person; does it not follow, from a parity of reason, that the merchant would have action against the sender for every thing taken on by the person so sent? Or if a servant, who has been sent to a merchant sometimes upon trust,

trust, after he has been dismissed, goes and buys in his master's name from that merchant, who knows nothing of his dismissal; would not the merchant have action for every thing taken on by that servant, until his dismissal (which is, no doubt, a revocation of the implied mandate) be notified to him? The expressions *sometimes* upon trust, and *usual* tradesmen, carry with them a good deal of perplexity: and, upon the whole, there seems to be good ground for thinking, that Mr Wood's position merits further consideration.

O B S. XXVI.

Servitude.

“ **S**ERVITUDES (says Mr Erskine) constituted by grant, are not effectual in a question with the superior of the tenement burdened with the servitude, unless his consent be adhibited; for a superior cannot be hurt by his vassal's deed: but when the servitude is acquired by prescription,

“ scription, the consent of the superior,
 “ whose right afforded him a title to inter-
 “ rupt, is implied *.”

By a parity of reason, it would seem, that if a vassal lost a servitude *non utendo*, his negligence would prejudge the superior, who had as good a title in this case as in the other to interrupt and hinder the proprietor of the servient tenement *usucapere libertatem*.

Lord Dirleton, voce *Prescription*, in his doubts, reasons much after the same manner, in the case of fiar and liferenter. “ If (says he) there were a liferenter and “ a fiar, and the fiar should not prevail “ with the liferenter to join in an action “ for interrupting the prescription, the fiar “ should be without remedy, if he would “ not interrupt by declarator; and if a de- “ clarator do interrupt, it cannot be said, “ that *non valebat agere*.” Sir James Stewart, in his answers†, is of opinion, “ that a fiar, excluded all the while by a “ liferenter, should be excused in the

* II. 9. 3.

† p. 223.

“ case

“ case of prescription, as *non valens*; and
 “ the necessity of raising a declarator for
 “ interruption doth not appear while the
 “ fiar stands precluded, as said is, and pre-
 “ scription is odious.”

But it would seem, that the fiar should be prejudged by the prescription if a superior is so in the like case: for a fiar ought to attend to the concerns of the lands of which he is fiar, much more than a superior to those of the lands of which he is superior; because a fiar is certain that the possession of the lands will revert to him sooner or later by the death of the liferenter; but the superior is quite uncertain if ever he shall attain possession of his vassal's lands, for he can never do but by a casualty that may possibly never exist.

By the Roman law, “ *Fructuarius qui-*
 “ *dem acquirere fundo servitutem non po-*
 “ *test, retinere autem potest; et si forte fue-*
 “ *rint non utente fructuario amissæ, hoc*
 “ *quoque nomine tenebitur.*” *l. 15. in fin.*
ff. de usufr.

The liferenter cannot acquire a servitude to the fiar by the Roman law; because it is a

maxim, That *nemo jure Romano alteri cujus in potestate non est acquirat* *. One may acquire by his children or servants, because they were considered, not as persons, but things; and therefore whatever they gained, accrued to their father or master by accession. But as this subtilty has been exploded by our law †, it may be thought, that with us a liferenter can acquire a servitude.

There can be no doubt, that a liferenter not only may, but ought to retain a servitude; for “*si forte fuerint non utente fructuario amissæ, hoc quoque nomine tenebitur.*” These words may give rise to several questions. In the *first* place, Would not the liferenter be liable to the fiar, when he suffers the proprietor of the adjacent grounds to acquire a servitude on the liferented lands by the positive prescription, as well as when he loses a servitude competent to the liferented lands by the negative prescription? *2dly*, Would

* Hein. inst. § 482. 469. 354.

† See the dict. under *Jus quæsitum tertio*.

the liferenter be liable to the fiar, when the fiar knew that either of the prescriptions was running against his lands? 3^{dly}, Would the minority of the fiar interrupt the prescription so as to avail the liferenter, and *vice versa*? As the possession by which a servitude is acquired must be *nec vi, clam, aut precario*, as even in this case the prescription does not run against a minor, or one otherwise *non valens agere*, can a case be imagined, in which the fiar did not know of the course of the prescription? These questions are far from being clear, and yet I do not find them determined by the commentators.

From the reasoning of our lawyers mentioned above, it is plain, they found their opinion on the implied consent of the superior or fiar, which they infer from his not using his title to interrupt; consequently any period of time, during which the superior or fiar was *non valens agere*, must be deduced from the prescription. It is also a consequence of the above reasoning of our lawyers, that though liferenters find security with us as well as amongst the Ro-

mans; yet a liferenter who loses a servitude, would not with us be liable in damages; because the fiar had a title to interrupt, which since he did not exert, his consent must be implied.

O B S. . XXVII.

Arrestment.

“ * **R**egularly arrestment is made in the
 “ hands of those who have in pos-
 “ session the goods of the arrester’s debt-
 “ or, or are debtors to him; but it is
 “ sometimes used in the hands of the com-
 “ mon debtor himself†. This seems ir-
 “ regular, and will not be sustained in
 “ prejudice of purchasers from him; be-
 “ cause, as inhibition does not affect move-
 “ ables, so neither can arrestment laid in
 “ the debtor’s own hands, that being de-
 “ structive to commerce. But a particular
 “ subject may be arrested in the common

* Inst. I. 197. 32.

† Jan. 10. 1624. Laird Innerwick.

“ debtor’s

“ debtor’s hands, in order to subject him
 “ to the breach of arrestment *, in case
 “ he incur it; and the regular way is, to
 “ point such goods: but the maxim, That
 “ *mobilia non habent sequelam*, will protect
 “ *bona fide* purchasers.”

It does not appear, from the above passage, why an arrestment of moveables laid on in the common debtor’s own hands, ought not to be sustained. It certainly will not render purchasers from him unsafe, though the decision in 1624 finds otherwise. If an inhibition does not affect moveables, so as to render a purchaser from the inhibited person unsecure; *multo minus* should an arrestment render purchasers unsafe, whether it is laid on in the hands of the common debtor himself, or in the hands of the debtor to the common debtor. For an inhibition does not only discharge the inhibited person to sell, but it also discharges the lieges to buy from him: and therefore it is executed not only against the inhibited person, but against

* Newt. decis. 100.

the lieges, by publication and registration; whereas an arrestment only prohibits the person in whose hands it is used, and therefore is in no shape notified to the public.

There is then no difference, as to purchasers, betwixt moveables arrested in the hands of the common debtor himself, and moveables arrested in the hands of the debtor to the common debtor. If the purchaser from the first is safe, the purchaser from the other must be so too, and *vice versa*. Now, that the purchaser from the first is safe, is very justly concluded by the author of the Institute; “because as inhibition does not affect
“moveables, so neither can arrestment
“laid on in the debtor’s own hands.” It might have been added, “or in the
“hands of any other arrestee,” for the same reason. It may perhaps be said, that arrestment renders the subject arrested litigious, and creates on it a *nexus realis*, as was found 1738, *Earl Aberdeen*. But there is nothing in this. “An adjudication (says Mr Erskine), which is a
“judicial

“ judicial conveyance, and marriage, which
 “ is a legal one, carry the full right of
 “ the subjects thereby conveyed, without
 “ intimation. St. 368. Nevertheless, as
 “ there is nothing in these conveyances
 “ which can put the debtor *in mala fide*;
 “ he is therefore *in tuto* to pay to the
 “ wife, or to the original creditor in the
 “ debt adjudged, until the marriage or
 “ adjudication be notified to him *.” *Er-*
go, a fortiori, a *bona fide* purchaser from
 every arrestee is safe, excepting in one
 case: for an arrestment does not carry
 (like an adjudication) the subject arrested;
 it is only a step of diligence, which founds
 the user of it in a process of forthcoming,
 and creates a *nexus realis* only in this re-
 spect, that it does not fall by the death
 of the arrestee, but subsists as a ground
 of action against his heir while the sub-
 ject is *in medio*. But it goes no fur-
 ther, and may therefore be frustrated by
 the subsequent poinding of another credi-

* III. 5. 4. See also Stewart's answers, voce
Adjudication.

tor. Now, if by an adjudication or marriage, which carry the subjects, and of which the one is recorded, and the other notified by proclamation of bans, the debtor is not put *in mala fide*, but is notwithstanding *in tuto* to pay to the wife, or original creditor, until the marriage or adjudication be intimated to him; how much more should a *bona fide* purchaser be safe from the effects of an arrestment?

I have said so much on this point, because, by the decision 20th January 1624, *Laird Innerwick*, it was found, that a purchaser of moveables arrested in the hands of the common debtor, was not safe; and by another decision in the 1620, observed by Hope, it was found that a purchaser in a public market was safe, notwithstanding of an arrestment*; which seems to imply that other purchasers are not. Besides, in the above passage of the Institute, mention is made only of arrestments laid on in the debtor's own hands, which might per-

* Dict. voce *Litigious*.

haps induce some to think that an arrestment used in the hands of the debtor to the common debtor, had other consequences ; which certainly is not law, nor is it to be reckoned the opinion of the author above quoted, who in more than one passage of his book inculcates the maxim, *Mobilia non habent sequelam.*

O B S. XXVIII.

De accusationibus.

BY our law, says the late Institute *,
 “ Private persons, even such as are
 “ greatly concerned to have the crime
 “ punished, cannot by themselves insist
 “ in the prosecution ; but must have the
 “ concurrence of the king’s advocate.
 “ But, by the law of England, the wife
 “ may sue an appeal against the murder-
 “ er of her husband ; or if there is no
 “ wife surviving, the next heir, being a

* I. 304. 13.

“ male,

" male, though the descendent of a fe-
 " male, may prosecute it. It is a private
 " action, belonging to them, for them-
 " selves, on account of the injury done
 " them, and for the crown in respect of
 " the felony *."

It may well be doubted, if the above representation of our law, as to this point, be just; on the contrary, it would seem, that with us it is lawful for every person, *suam aut suorum injuriam persequi* †, though the king's advocate should refuse to concur. At the same time, the private party cannot, by compromising the matter with the offender, screen him from justice; for then the king's advocate may strike in, and prosecute him, though the private party has been bought off, and should disclaim the process. This doctrine, I imagine, will be sufficiently established, by the following texts. Reg.

* By the law of Holland too, no private person can carry on a criminal prosecution. See Voet, comm. h. t. n. 18.

† So says Sir George Mackenzie, Crim. part 2. tit. 19.

Maj.

Maj lib. 4. c. 5. “ Conforme to the
 “ law made anent accusation, in this case
 “ na man is admitted, bot gif he be sibbe,
 “ be reason of blude to him quha is
 “ murthered: fwa that he quha is nearest
 “ be blude to the stock, fall exclude him
 “ quha is farthest from all accusation.”

—— “ Na accuser is admitted to prove
 “ the crime, except he be conjoined to
 “ the man that is slain, be consanguini-
 “ tie, homage, or maistership, (that is, the
 “ cusin for slaughter of his cusin, the mai-
 “ ster for slaughter of his vassal, quha
 “ made homage to him, or the lord for
 “ the slaughter of his servant).”

What, in my apprehension, puts this
 matter beyond all doubt, is the act 1587,
 c. 77.; the title of which bears, “ The
 “ king may persue all crimes without the
 “ pairtie.” It enacts, “ That the thea-
 “ fourer and advocate persue slaughters
 “ and utheris crimes, althocht the pair-
 “ ties be silent, or wald utherwayes privi-
 “ ly

“ ly agree *.” So that the king’s advocate is only to prosecute *in subsidium*, in case the private party do not. This is further illustrated by the act against ravishers of women; which provides, “ That if the

* Sir George Mackenzie’s observation on this act, is in these words. “ As parties may pursue crimes without concurrence of the king’s advocate; so, by this act, the king may pursue without an informer.” The late abridgment of our statute law, voce *King’s advocate*, says, “ King’s advocate insisting *ad vindictam publicam*, is not *de jure communi* liable in expences, because he is not presumed to pursue calumniously. See 1557, c. 251.” But this is by no means the meaning of the act, as will appear upon looking into it. Sir George Mackenzie, in his observation upon it, says, “ By this act, when improbation is proposed at the King’s instance, the informer is to find caution; but if the King’s advocate insist *ad vindictam publicam*, I conceive he is obliged to find no caution, because he is never presumed to pursue calumniously.” The abridgment has put Sir George’s observation on this act, for the meaning of the act itself. Had it been as in the abridgment, it would have shown that the King’s advocate might have pursued *ad vindictam publicam*, before the above recited act 1587, c. 77.

“ woman’s

“ woman’s parents, or nearest kinsfolks,
 “ *or his Majesty’s advocate*, shall be able
 “ to verify,” &c.

There is, indeed, one statute, by which the private party is obliged to have the concurrence of the king’s advocate. It is the act against usury, 1597. c. 151. By it the usurious obligation is declared null, and the nullity is to be pursued, by the party, his heirs, executors, and assignees, “ with concurrence of the king’s advocate against the creditor.” The reason is, because his Majesty had a joint interest with the private party, nay, by far the greatest interest of the two; for, upon the reduction of the usurious obligation, his Majesty, or his donatar, had right to the principal sum and ordinary annualrents: whereas the private party had only repetition of what he had paid over and above the legal interest, and that in case he concurred with the king’s advocate, otherwise not. But the last clause of the act provides, That his refusal shall not bar action at the instance of his Majesty’s advocate or donatar. From this it would seem, that if the do-

K

natar

natar concurred with the private party, it was enough. Now, if the concurrence of the king's advocate was only necessary when there was no donatar, it follows, that his concurrence was not required *qua* public prosecutor *ad vindictam publicam*, but *qua* king's advocate, to take care of the pecuniary interest his Majesty had in the cause.

However, it must be acknowledged, that now-a-days, though the king's advocate often carries on criminal prosecutions by himself, yet no private party ever does; though, from what has been stated above, it is evident, that if the king's advocate should unjustly refuse his concurrence, there is good ground in our law for sustaining the title of the private party alone. If, indeed, a private party should insist in a criminal prosecution without ever having asked the concurrence of the king's advocate, though he certainly might have done so in former days; yet, as now, for a considerable time, the practice has run otherwise, it is probable, that our judges would

would discourage such an innovation, and dismiss the prosecution.

The opinion, according to which private parties cannot intent criminal processes, even when the king's advocate denies them his concurrence, is far from being absurd, or destitute of principles; which I take to be these.

In most crimes, the offender injures a private person, and, at the same time, offers an insult to the public. Hence he subjects himself to two actions. The representative of the public may prosecute him criminally *ad vindictam publicam*, and the private party may sue him for reparation. These two actions are quite distinct: therefore, though the party wronged should forgive and discharge the criminal, that would not protect him from punishment; *vice versa*, though the king's advocate should refuse his concurrence to bring the criminal to a trial, or though the king himself should grant him a pardon, yet the private party's action for an assythment will not be prejudged: but if the private party alone should commence a criminal

nal prosecution, he would be told, that an assythment was all he could claim, the *vindicta publica* being *jus tertii* to him.

For the same reason, the party injured and his nearest relations are habile witnesses, if the prosecution is at the instance of the king's advocate *ad vindictam publicam*; "otherwise (says the late Institute *) the crime might escape punishment, and the party is not to gain or lose by the event." And, for the same reason, the verdict of an assize, finding a man guilty of theft, is not *probatio probata* in an action before the court of session † for damages, being *res inter alios acta*, viz. betwixt the king's advocate and the thief; whereas, before the court of session, the question is betwixt the thief and the private party.

There is certainly a good deal in this reasoning; and the opinion which it favours may be esteemed more accurate and juridical; but the other is more suited to the common sense and notions of mankind:

* II. 647. 16.

† Dict. Res inter alios acta, v. 2. p. 349.

for you will never convince them, that wives and children have no title to pursue *ad vindictam* the murderers of their husbands and parents. It is likewise agreeable to the Civil law, by which even women and minors were admitted *suam et suorum injuriam persequi*; and to the Jewish law also, which allows of a *revenger of blood*, who appears to have been the nearest relation of the deceased *.

O B S. XXIX.

Murder.

IF a man hound a dog at another, and the dog bite him, so that he die; or if a man strikes another with a cane, when he had a sword, and the blow prove mortal, Sir George Mackenzie says, it is *homicidium culposum* †. The criminal, in these cases, seems to be much akin to him

* See the notes on Hale's pleas of the crown, v. 1. p. 3.

† Crim. tit. *Murder*, par. 9.

qui mandat vulnerare, mandatarius tamen occidit. The dog or the cane may be considered as the *mandatarius*, who has gone beyond his commission. The punishment is commonly said to be arbitrary.

A case was determined by the parliament of Bourdeaux, pretty similar to that of Mr Carnegy of Finhaven : “ Un
 “ nommé Jean Dupuis convaincu d’avoir
 “ tué un homme pour un autre, qui s’é-
 “ toit mis derriere pour eviter, a été con-
 “ damné d’être fustigé par deux divers
 “ jours *.”

By the act 1690, c. 21. upon a narrative that frequent murders had been committed upon innocent infants, it is enacted,
 “ That if any woman shall conceal her
 “ being with child during the whole space,
 “ and shall not call for and make use of
 “ help and assistance in the birth, the
 “ child being found dead or amissing, the
 “ mother shall be holden and reputed the
 “ murderer of her own child, though there

* Dec. 12. 1730. See the dict. des arrests, voce *Homicide*, tom. 1. p. 368. num. 14.

“ be no appearance of wound or bruise up-
 “ on the body of the child.”

This act seems in a great measure to have
 been copied from a French edict. “ Il y
 “ a edit du Roy Henry, que toute fem-
 “ me qui se trouvera durement atteinte,
 “ et convaincuë d’avoir celé, couvert,
 “ et occulté, tant sa grossesse que son en-
 “ fantement, sans avoir déclaré l’un et
 “ l’autre, et avoir pris de l’un et l’autre,
 “ témoignage suffisant, même de la vie
 “ ou mort de son enfant lors de l’issuë
 “ de son ventre, et qu’après se trouve l’en-
 “ fant avoir été privé du saint sacre-
 “ ment de batême, et sepulture publique et
 “ accoûtumée, soit telle femme tenuë et
 “ réputée d’avoir homicidé son enfant,
 “ et pour la réparation punie de mort,
 “ et de telle rigueur que la qualité par-
 “ ticuliere le meritera*.

Our act of parliament, and the French
 edict, extend to all women married, as
 well as unmarried, though it was these
 last who gave rise to both; though even

* Dict. des arrests, voce *Grossesse celée*.

married

married women will sometimes murder their children from shame, if they are palpably adulterous, and they may sometimes do so from worse motives, *e. g.* after divorce, out of spite to their husband; and Cicero, in one of his orations, tells of a woman who was put to death for procuring an abortion, to which she had been bribed by those who expected to be heirs to her husband, in case of his dying childless. See l. 39. D. de poenis.

If a woman with child is condemned to die, her execution is delayed till she be delivered and recover, l. 18. D. de statu hom. Neither can she be put to the torture in that situation, l. 3. D. de poenis. And it would seem, that she ought not to be whipped, or made to undergo any corporal punishment, which must occasion a violent shock to the body.

“ L’ execution du jugement de mort
 “ est quelquefois retardé a cause de la
 “ grossesse de la femme condamnée, pour
 “ vû qu’elle soit certaine. Nodine Du-
 “ rand ayant été condamnée à mort, il
 “ fut juge au parlement de Rouen, le 19.
 “ Juin

“ Juin 1635, que l'exécution ne seroit
 “ pas différée sur le pretexte d'une gros-
 “ sesse qui n'étoit crûe, que de quinze
 “ jours, licet fructus sit in semine; toute-
 “ fois le part n'étant point animé, il y a-
 “ voit trop de peril à différer une execu-
 “ tion, et nul inconvenient à executer
 “ la condamnée à mort ; mais la grossesse
 “ étant certaine, la prononciation de l'ar-
 “ rêt doit se différer comme l'exécution,
 “ *ne partus pereat* *.”

The plea of pregnancy does not, by the law of England, retard execution, unless the woman be with child of a quick child. *Hale's pleas of the crown, vol. 1. p. 368. 369.*

The reason that *toutefois le part n'étant point animé*, is not sufficient : for, at that rate, it would follow, that a woman who procured an abortion, while the *fœtus* was yet inanimate, ought not to be punished at all ; whereas all lawyers are agreed, that she ought to be punished at least arbitrarily ; and if the abortion is

* Dict. des arrests, voce *Grossesse celée*.

procured

procured after the *fœtus* has begun to live, capitally.

Here the question occurs, When the *fœtus* begins to be *vitalis*? Physicians differ as to this point; but there is no reason why lawyers should; for *septimo mense nasci perfectum partum jam receptum est, propter auctoritatem doctissimi viri Hippocratis, l. 12. D. de st. hom.* So that it would seem we need not go very nicely to work, about the formation of the *fœtus*; but hold, that if a woman procures an abortion before the seventh month of her pregnancy, she should be punished arbitrarily; if after that period, capitally. See, as to the punishment of this crime, Hale's pleas of the crown, vol. 1. p. 433.

O B S. XXX.

Rape.

LAst autumn, two boys, one above sixteen, the other under fourteen years of age, were committed in order to
be

be tried for a rape, before the circuit-court at Jedburgh. But some days before the judges came to that place, they made their escape, and have not been further heard of. As this is a pretty singular case, it may perhaps be worth while to consider what defences they might have insisted on, had they stood their trial.

The fact was, That these two boys, one day that they happened to be in the fields herding some cattle, along with a young girl, forcibly lay with her one after another. The girl, when she came home, acquainted a friend or two with her misfortune; but neither she or they complained to a judge, or even made it otherwise public. However, the story took air, and about three months after the fact was said to have been committed, a precognition was taken, and the boys were incarcerated.

From this state of the fact there seems to arise, in the first place, a defence common to both the boys; and then another, which is peculiar to the youngest.

The first defence common to both the boys, is founded on the distance of time between

between the alledged commission of the crime and the commencement of the prosecution. By the Regiam Majestatem it is provided, " That na man sall be heard to accuse an-
 " other of reif, revissing of wemen, or of
 " haimfuckin, except he make ane lawful
 " soyt, in manner foresaid. *And gif he*
 " *delays be the space of ane night,* to the
 " effect he may have the counsell of his
 " friends, and swa makes not fresh and
 " recent persute, and that be proven a-
 " gainst him, the defender shall be quite,
 " and the accuser fall be in the king's
 " mercie *."

One of our latest writers observes, " By
 " our old law, R. M. l. 4. c. 10. in the
 " cases of rape, robbery, and hamesuc-
 " ken, the party injured was not heard af-
 " ter a silence of twenty-four hours, from
 " a presumption, that persons cannot be
 " so grossly injured without immediately
 " complaining; and it is probable, that a
 " prosecution for these crimes, if delayed
 " for any considerable time, would be cast

* Lib. 4. c. 10.

“ even at this day, or at least the punishment restricted.”

Hale * delivers his opinion much to the same purpose: “ As to the appeal of the party ravished, (says he), two things are necessary: first, that she make fresh discovery and pursuit of the offence and offender, otherwise it carries a presumption that her suit is but malicious and feigned.” And he quotes a passage from Bracton, which prescribes to a woman that has been ravished, the same method and form of seeking redress that the Regiam Majestatem does in lib. 4. c. 8. Bracton says, “ Cum igitur virgo corrupta fuerit et oppressa, *statim* cum factum recens fuerit, cum clamore shutesco debet accurrere ad villas vicinas, et ibi injuriam sibi illatam probis hominibus ostentare,” &c. The Regiam Majestatem says, “ The woman quha has suffered sic violence, should incontinent, so lang as the crime is recent, passe to the next towne, and

* Pleas of the crown, vol. 1. p. 632.

L

“ there

“ there declare to honest men the injurie
 “ done to her,” &c.

Supposing this defence to have been over-ruled, as, in this case, it probably would have been; yet the youngest boy could have insisted, that he was within the years of pupillarity, and consequently held by law, *præsumptione juris et de jure*, to be *impubes*, and incapable of knowing carnally any woman. This plea is sustained by Hale *. “ An infant (says he) under
 “ the age of fourteen years, is presumed
 “ by law unable to commit a rape; and
 “ therefore, it seems, cannot be guilty of
 “ it: and though in other felonies *malitia*
 “ *supplet ætatem* in some cases, as hath
 “ been shewn; yet it seems, as to this
 “ fact, the law presumes him impotent,
 “ as well as wanting discretion.” (See Obs. XI.) But, at any rate, even the youngest boy behoved to have been condemned according to this author’s notions: for he immediately subjoins, “ But he may
 “ be a principal in the second degree, as

* Pleas of the crown, vol. 1. p. 630.

“ aiding

“ aiding and assisting, though under four-
 “ teen years, if it appear by sufficient
 “ circumstances, that he had a mischievous
 “ discretion, as well as in other felonies.”

O B S. XXXI.

Fire-raising.

BY our law, murder is punished capi-
 tally, so is wilful fire-raising *. *Hom-*
micidium culposum is punished arbitrarily,
 so ought *incendium culposum*, or reckless
 fire-raising: nor have statutes been want-
 ing for that purpose. But, by our present
 practice, though the most terrible and de-
 structive fires are frequently occasioned by
 the carelessness of servants, yet they e-
 scape with impunity.

By the borough-laws †, “ Gif fire pas-
 “ ses forth of any man’s house, and burns
 “ fundrie houses of his neighbours, na
 “ hurt nor skaith shold be injoined to him

* 7th Ann. c. 20.

† c. 54.

“ out of quhais house the fire did come,
 “ mair nor he hes alreadie suffered, for he
 “ hes sorrow and skaith eneugh alredie *.”

By an act in the reign of K. James I. †, very different regulations are laid down :
 “ Gif burning happenis in onie towne, frae
 “ the fire be stanchied, the alderman, bal-
 “ lies, and governours of the townes, in-
 “ continent fall inquire quhom-throw,
 “ and how the fire happened ; and gif it
 “ be founden on purpose deed, forefaul-
 “ tour fall be punition to them : and gif it
 “ happenis of misgovernance, and not of
 “ set purpose ; if it be a servand, and that
 “ servand have gudes, he fall be punish-
 “ ed in his gudes, be the sight of the go-
 “ vernours of the towne, and given to the
 “ man that thoilis the skaith, and sine
 “ banished the freedome for three yeires ;
 “ and gif the servand hes na gudes, he
 “ fall be doungin openlie at the mercat-

* The Roman emperors reason much in the same way, in that rescript which declares a madman is not to be punished for any crime : *Cum satis ipso furore puniatur*, l. 14. *de off. pres.*

† 1426. c. 75.

“ croce,

“ croce, and throw the towne, and fine
 “ banished that freedome for seven yeires.

“ *Item,* Gif it be a man that awe the
 “ house, and burnis it reckleslie, or his wife,
 “ or his awin bairnes, quhidder his night-
 “ bours takes skaith or nane, attour the
 “ skaith and shame that he thoilis, he or
 “ they fall be banished that towne for thre
 “ zieris: and gif it be ane man that maillis
 “ the house, and burnis it reckleslie, he
 “ fall amed the skaith after his power,
 “ and be banished the towne for three
 “ zieris: and gif it be a stranger or a tra-
 “ veller, he fall be arrested, gif he be
 “ of power to amend the skaith; and if
 “ he be not of power, he fall byde in sic-
 “ kerneffe at the king’s will.

“ *Item,* If the baillies and governours
 “ of the towne findis nae man in wyte,
 “ bot of suddaine caise that may not be
 “ foreseen, as wilde-fire, rattones, or
 “ foules, or sicklikeneffe, the law leaves
 “ it unpunished.”

Perhaps this statute is too severe, espe-
 cially that clause of it which punishes those
 who dwell in the house, though the fire

hurt no body but themselves. This made people conceal the fire as long as possible, and was perhaps the chief reason for this law going into disuse. However, it appears from Sir George Mackenzie's Observations, that it was in force in his time.

By the Common law of England, till the year 1706, the person in whose house or chamber a fire broke out, was obliged to repair the damage done in or upon the said house or chamber, without burdening the plaintiff with a proof of the defendant's fault or neglect, which the law presumed, *quia incendia plerumque sunt culpa inhabitantium*. Upon this law, Helenor Edwards, in 1706, brought an action against Katharine Prescot, before the court of Queen's-bench, and obtained a decree for L. 240 Sterling. In order to elude this decree, Mrs Prescot retired into Scotland: but Mrs Edwards brought another action against her, before the court of session, founding upon her English decree. The decision is observed by Home in his remark. decis. num. 21. It is there said, this decree of the Queen's-bench gave

gave rise to the act 6. *Annæ*, intituled, *An act for the better preventing mischiefs that may happen by fire.* By this statute (which was afterwards made perpetual), it is, *inter alia*, enacted, “ That no action, suit, or process
 “ whatsoever, shall be had, maintained, or
 “ prosecuted, against any person in whose
 “ house or chamber any fire shall, from
 “ and after the said first day of May,
 “ accidentally begin, or any recompense
 “ be made by such person, for any damage
 “ suffered or occasioned thereby, any
 “ law, usage, or custom, to the contra-
 “ ry, notwithstanding. And if any action
 “ shall be brought for any thing done in
 “ pursuance of this act, the defendant
 “ may plead the general issue, and give
 “ this act in evidence; and in case the
 “ plaintiff become nonsuit, or discon-
 “ tinue his action or suit, or if a verdict
 “ pass against him, the defendant shall
 “ recover treble costs.”

One would naturally think, from the words of this statute, all along, that it was confined to England; but Lord Bankton seems to be of opinion, it extends to
 Scot-

Scotland*. However, if it does, why are not servants, whose carelessness sets houses on fire, punished in terms of it? For by another clause it is enacted, “ That
“ if any servant, by negligence or carelessness, fire or cause to be fired, any
“ house, and is lawfully convicted thereof, by the oath of one or more credible witnesses, before two justices of
“ the peace; such servant shall forfeit
“ and pay the sum of one hundred pounds
“ Sterling, to the churchwardens of the
“ parish within which the fire happens,
“ to be distributed by them among the
“ sufferers by the fire; and such servant,
“ in case of default or refusal to pay,
“ shall, by a warrant from two justices,
“ be committed to some workhouse, there
“ to be kept at hard labour, for the
“ space of eighteen months.”

* It is omitted in the late judicious abridgment of our statute law.

O B S. XXXII.

Forgery.

MAckenzie, Stair, Erskine, Baine, &c. are agreed, That a decreet of the court of session, finding a man guilty of forgery, and remitting him to the justiciary, is *probatio probata*; and that the assize, upon production of it, must find him guilty. Lord Bankton alone* is of opinion, that the jury may acquit the pannel, if the proof which convinced the court of session, is not satisfactory to them. His Lordship seems to be very much in the right.

There is good reason for making the court of session competent to this crime, though it is a civil court: there is good reason for denying the person accused of forgery, the privilege of forcing his trial to be brought on within a limited time:

* I. 298. 228.

and

and there is good reason for leading the proof, not (as in other crimes) in presence of the assize, but before the Lords of Session. All these transgressions of the common rules of law are necessary ; because, in forgery, the expiscation of the truth is commonly very tedious and difficult ; and, consequently, not inconsistent with the dilatory forms of the court of session, though incompatible with the peremptory dispatch of the justiciary. But as there is no necessity for any more exceptions, there is no foundation for maintaining that a pannel's life may be taken away by a sentence of the court of session, upon its being confirmed by a simulate verdict of an assize.

O B S. XXXIII.

Theft.

THE laws of several countries have punished nocturnal thieves with far greater severity, than those who steal
by

by day. Yet there are some considerations which tempt one to think, that theft committed in day-light is in reality the greater crime of the two. For, in the *first* place, Surely one who steals in broad day-light discovers greater impudence, than he who, conscious of the baseness of his crime, makes a work of darkness of it, and seeks to conceal himself under cloud of night. *2dly*, Diurnal theft is the more dangerous of the two. In the day-time, the men are commonly dispersed in different places about their business, and none but women and children remain at home; but at night, the whole family is collected, people are on their guard; their doors are locked, and their windows secured: so that it is astonishing to hear Matthews say, “ *Copiam furandi noctu majorem esse, incauta per quietem familia, manifestum est* *.

A certain horror and suspicion, which is natural to men in the dark, seems to be

* De crim. p. 224.

the true inductive reason of the above-mentioned laws against night-thieves.
 “ *Terrorem vero* (says Matthews) *cum*
 “ *fur incutit, tum tenebræ augent, formi-*
 “ *datque eo magis paterfamilias, quo in-*
 “ *certior est ad furandum duntaxat, an*
 “ *et occidendum dormitator veniat.*

O B S. XXXIV.

Pigeons.

THE country-people, over all Scotland, entertain an opinion, that to kill pigeons within so many miles of a dovecote, is highly criminal. But, according to the author of the late Institute *, this is a vulgar error. “ By special statutes † with us (says he) it is declared
 “ punishable as theft, to take deer out
 “ of other mens parks, conies out of
 “ their warrens, doves out of their dove-

* II. 594.

† 1474, c. 60. 1597. c. 270.

“ houses,

“ houses, or fish out of their ponds, with-
 “ out licence from the owner : but I find
 “ *no law* against killing deer, conies, or
 “ doves, found at large, distant from
 “ their inclosures, more than against kill-
 “ ing fish in the sea ; for they are all *fe-*
 “ *ræ naturæ*, and none has any proper-
 “ ty in them, except when they are
 “ within their inclosures ; and therefore
 “ the rule in the Civil law, That *cedunt*
 “ *occupanti*, must take place as to the
 “ same ; only the statutes introduced for
 “ preserving the game must be observed.”
 In another passage *, the same author ob-
 serves, that in England, “ where doves
 “ belonging to a dove-house feed on
 “ another’s corns, the party may kill
 “ them, and keep them to himself ; which
 “ is the proper relief by the Common
 “ law, in as much as they are counted
 “ no man’s property †.”

It is far from being clear, that the Civil
 law stands as above represented. Heinec-

* II. 517.

† Bacon’s new abridgment (Game) 1614.

cus, Voet, &c. tell us indeed, that, by § 14. Inst. de acq. rer. dom. pigeons, peacocks, and bees, are numbered *inter feras bestias*; whereas, say they, they ought to be reckoned *mansuetae*. It is said in the above paragraph of the Inst. that pigeons, peacocks, and bees, notwithstanding of the *consuetudo revertendi*, are nevertheless (not *feræ bestia*, but) *feræ naturæ*; which seems only to denote, that they are in a sort of middle state, betwixt *feræ bestia* and *animalia domestica*. This expression extends to doves in dovecotes, bees in hives, &c. which the word *mansuetae*, *i. e.* to use Heineccius's own words, *feræ domi nostræ circumscriptæ*, does not; for it only comprehends what we call *petts*. But it is not said in the above passage of the Institutions, that pigeons or bees continue to be *nullius*, and *cedere occupanti*, even after we have once apprehended them, if they are found at a distance from our inclosures. What proves the doctrine of the Civil law to be the direct contrary, is an express text, *viz.* l. 8. D. Fam. ercisc. " Pom-
 " ponius

“ ponius ait, *columbas* quæ emitti solent
 “ de columbario, venire in familiæ er-
 “ ciscundæ judicium, cum nostræ sint
 “ tamdiu quamdiu consuetudinem ha-
 “ beant ad nos revertendi. Quare, si
 “ quis eas adprehendisset, furti nobis
 “ competet actio. Idem et in apibus di-
 “ citur, quia in patrimonio nostro com-
 “ putantur.” This text seems to have e-
 scaped the observation of Voet and Hei-
 neccius; but it is noticed by *Coquille*, a
 French lawyer, who takes it for granted,
 that it contains the dictates of the Civil
 law. His words are, “ La loy Romaine
 “ a définé, et nous l’avons reçu, que
 “ les pigeons en colombier, combien
 “ qu’ils soient en leur naturelle liberté:
 “ toutefois tant qu’ils retiennent l’accou-
 “ tumance d’aller et retourner, et se loger
 “ au colombier; ils sont reputez propres
 “ au maître du colombier, comme sont
 “ autres animaux purement privez, et
 “ qui les prend sans le congé du maître,
 “ commet larcin. L. Pomponius, § i-
 dem ff. famil. ercisc. *”

* Oeuvres de Coquille, tom. 1. p. 186.

We have several acts of parliament against the killing of doves, which the learned author of the Institute has overlooked. By 1567, c. 16. it is provided, That whoever “schuttis in ony times coming, “with culvering, crosbow, or handbow, “at da, ra, hart, hynde, hair, cunning, “*dow*, herron, or foule of river, with- “in this realme, fall foirfault and tyne “their haill moveabil gudis, that ane “half thereof to our soveraine Lordis “use, and the other halfe to be ap- “plied to the judge, and apprehender “of him that committis the crime, to be “divided equallie betwixt them.” The acts 1581. c. 123. et 1583. c. 59. are to the same effect. The act 1597, c. 270, enforces the execution of all former laws against “the schutting and slay- “ing of deare, raes, hares, wilde-fowles, “and *dowes*, with hagbuttes, hand- “gunnes, croce-bowes, and pistolletts, “and taking of them with girnes and “nettes.”

From these statutes then it is plain, that
he

he who finds pigeons in his corn-fields, must put up with the damage they do him; for he cannot shoot them with guns or bows; nor yet catch them with girns or nets; far less can any other person, however qualified to kill game, destroy them for sport. Did the law stand otherwise, there would not be, in a little time, a pigeon left in the country: for as pigeons are far from being shy, and commonly sit close together, it is impossible for the worst shooter to miss them. There is no reasoning, as to them, from the laws allowing cattle to be poinded, by those on whose grounds they have incroached; for cattle are easily restrained; and their trespassing is, and must be owing either to their having no herd, which is contrary to law, or to the negligence of their herd; for which another ought not to suffer. But it is the nature of pigeons, to fly abroad, and *vivere rapto*: so that it would be a prohibition upon their owner to keep them, if his neighbour was permitted to

kill them *, when seeking their food on his ground.

By 1617, c. 19. it is enacted, That no person hereafter shall build a dovecote, who has not ten chalders of victual-rent, adjacent to the dovecote, or within two miles of it. This is the only relief which the law has given farmers against pigeons; and this act supposes and implies, that they have no title to rid themselves of them, either by shooting or catching them; for

* Coquille, the French lawyer above quoted, in tome 2. page 171. states this question. “ S’il
 “ est loisible tuer ou blesser les bêtes en dommage,
 “ si ce sont bêtes fugitives ou volantes, qui mal-
 “ aisement peuvent être appréhendées ? ” Which
 he answers in the affirmative; for such is the law
 of France. See the dict. des arrêts, under *Betail
 en dommage*. But this passage does not contradict
 the one before quoted: for by *bêtes fugitives vo-
 lantes*, he understands *bêtes fougasses, comme porcs,
 taureaux, ou vaches en amour, piqués de mouches, ou
 parce que ce sont bêtes volantes, comme oies et poules*;
 which he all along justly supposes, the owners
 may prevent from doing mischief; but it is abso-
 lutely impossible, as has been already said, for
 an owner of pigeons to hinder them from feeding
 upon the neighbouring fields.

if

if either of these methods had been lawful, it must have been sufficient.

The exception which the country-people make, in case pigeons be found several miles (I believe six, but cannot be positive) from a dovecote, carries a good deal of reason in it, though it is not countenanced by any statute: for when pigeons are so far from a dovecote, there arises a strong presumption, that *animus revertendi deposuerint*.

O B S. XXXV.

Resettlers.

SIR George Mackenzie, on act 91. parl. 6. Jac. I. observes, " That the
 " resetter of a murderer is punished as a
 " murderer; and this, by the Civil law,
 " is clear, in resettlers as to all crimes, l. 1.
 " D. de receptat. Lun. c. de crim. pec.
 " which is made our law by act 146.
 " par. 12. Jac. VI. And yet some think,
 " some resettlers are only to be punished
 " as

“ as severely as the principal offenders,
“ who assist in the crime, and then reset,
“ for these contract a double guilt.” Sir
George has not misrepresented the Civil
law, but he has ours.

If one was to consider, what principle
ought to be followed in ascertaining the
punishment of resetters [receivers], it
would seem, that a distinction should be
made betwixt the resetters of those offen-
ders whose crimes are permanent, and the
resetters of those whose crimes consist in
one single act. The first sort of resetters
ought to be punished as severely as the
principal offenders themselves; the second
sort more gently, because he who har-
bours an offender whose crime is perma-
nent, becomes art and part with him;
which cannot be said of him who harbours
an offender whose crime consists in a single
act, because it is already over before he
resets him. Hence the resetter of a thief
ought to be punished as a thief; for the
thief's crime is permanent, the *contrecta-
tio rei alienæ* continuing till restitution; for
which reason a thief is said to be *semper in
mora.*

mora. In the fame way the refetters of rebels ought to be punifhed as rebels. Accordingly, by our law, the refetters of fuch criminals are punifhed as feverely as they, ftat. 21. Alex. II. & 146. par. 12. Jac. VI. (which laft ftatute refers to the refetters of rebels and traitors only, and not to all forts of refetters, as Mackenzie fays). On the other hand, the refetters of criminals whole crime confifts in one fingle act, ought to be punifhed with lefs feverity: for example, the refetters of murderers, ravifhers, &c. becaufe they are not in any wife art and part in the murder and rape; though, to be fure, they deferve to be chaftifed, for endeavouring to fhelter the perpetrators of fuch crimes from juftice. Accordingly, by our law, the refetters of murderers are not punifhed as the murderers themfelves, but by fingle and liferent efcheat, ftat. Rob. II. c. 10. par. 7. 1592. c. 20. See alfo Mackenzie's Criminals, part 1. tit. 20. par. 30. where he contradicts in a manner what he had faid in the above paffage of his obfervations.

OBS.

O B S. XXXVI.

De criminibus extraordinariis.

ONE Forbes, a schoolmaster, was lately tried before the court of justice, for debauching and abusing young girls under his care. He was found guilty; but the libel having been restricted to an arbitrary punishment, he was only whipped and banished. The want of a particular statute with us against this crime was probably the reason why the King's advocate did not insist for a capital punishment, either against Forbes, or against another fellow who was convicted of the same crime some years ago.

In France, “ * Celui qui a fait ses efforts pour connoître une jeune fille, dont il a été empêché par l'age, doit être puni capitalement, et suivant la condition des parties. Arrêt du parlement de Grenoble, du 28. Janvier 1581.”

* Dict. des arrests, voce *Rapt*,

“ Un ravisseur et violateur d’une fille de
“ quatre ans et huit mois, condamné à la
“ Rouë par arrêt du dernier Août 1616.”

In England the carnal knowledge of a woman-child, with or without her consent, is death by statute. Hale’s pleas of the crown, v. 1. p. 627. 628. & seqq.

Forbes’s crime was aggravated by the highest breach of trust; and his case seems somewhat analagous to that of a tutor who debauches his ward, or of a priest who debauches women whose confessor he is. The courts of France, though they have no particular law against these crimes, have not scrupled however to inflict a capital punishment on those who have been guilty of them. “ Arrêt du parlement de Grenoble, du 31. Janvier 1660, qui condamna un prêtre d’être pendu, puis brulé, pour avoir abusé du sacrement de confession, porté ses mains sur le sein et autres parties de plus de cent femmes pendant qu’il confessoit. *Basset*, tom. 1. liv. 6. tit. 19. chap. 6. * ”

* Dict. des arrests, voce *Confesseur*.

“ Si un directeur, qu'on pretend avoir
“ abusé de sa penitente, a pu être con-
“ damné à mort, n'y ayant ni loy ni
“ ordonnance qui impose cette peine à
“ ce crime. Ce procès a été jugé à la
“ Tournelle criminelle, par arrêt du
“ 22. Juin 1673. lequel a confirmé la
“ sentence du lieutenant criminel du
“ chatelet de Paris, et le lendemain 23.
“ Ce prêtre, directeur de religieuses, fit
“ amende honorable à Notre Dame, en-
“ suite il fut pendu et brulé avec son pro-
“ cès, dans la place Maubert. *Journal*
“ *du palais, tome 2. pag. 972. et cy-*
“ *apres inceste spirituel.*”

“ Un tuteur ayant été trouvé par les
“ Capitouls couché en chemise, avec sa
“ pupille agée de 10 à 11 ans, toute nue,
“ dans un lit, étant appellant de la
“ sentence de Capitouls, qui l'avoient
“ condamné à être mis en quatre quartiers:
“ mais étant certifié par la visite faite
“ par deux bartuers et deux sages femmes,
“ que la fille n'avoit point été deflorée,
“ fut seulement condamné à faire amende
“ honorable en audience, en chemise,
“ tête

5.

ir

a-

ni

à

la

u

la

u

2.

it

a-

o-

al

-

s

es

ā

,

a

t

:

e

,

,

e

,

e

6.

oir

n-

ni

à

la

du

la

du

3.

fit

n-

ro-

al

y-

es

fa

é,

la

nt

s:

te

s,

e,

le

é,

te

“ tête nuë, la hart au col, et une torche
 “ ardente en la main, et aux galeres
 “ pour dix ans, et en 500 livres vers la dite
 “ pupille pour son mariage, et en 100
 “ livres à la reparation de la ville. *Arrêt*
 “ du p. du Toulouse, du 13. Sept. 1551.*”

O B S. XXXVII.

Fine.

BY the act 38. parl. 1. Ch. II. the husband is obliged to pay the fine imposed on his wife for profane cursing and swearing. “ *Ergo regulariter*, (says Mackenzie†), the husband is not liable for
 “ his wife’s fine, if there be no warrant
 “ therefor by statute.” Not many years ago it was decided, that the wife’s fine cannot be exacted till the dissolution of the marriage takes place, unless she has a separate estate || : yet as *interest reipublicæ ne cri-*

* Dist. des arrests, voce *Tuteur*, tome 3.
 p. 781. n. 44.

† Crim. tit. 3. § 6. || See Ersk. I. 6. 4.

mina maneat impunita, it would seem, that the public utility should prevail, however inconvenient it may be for the husband. The author of the *Causes Célèbres* complains loudly * of the French law, which agrees with ours in this particular. His words are worth transcribing: “ Il seroit à souhaiter, qu’en matiere criminelle, les condamnations à des peines pecuniaires, prononcée contre la femme, puissent s’executer sur les biens, malgré le mari, et qu’on ne l’ecoutat point, lorsqu’il dit, que comme maître de la communauté on ne le peut pas dépouiller des revenus des biens de sa femme. Cette jurisprudence devoit bien être établie, le mari en seroit plus vigilans sur la conduite de sa femme, et elle n’eluderoit pas, pendant la vie de son mari, la peine pecuniaire de son crime, ce qui est une espece d’impunité, qui est un veritable abus à reformer.”

* Tom. 4. p. 298.

O B S. XXXVIII.

Insolvent debtor.

BY the law of ancient Rome, when a man became insolvent, his creditors might sell him; and even in more civilized times insolvent debtors *addicebantur creditoribus*, till they had paid them by their work*.

If an expert watchmaker, organist, or other artificer, who is, perhaps, able to

* A like regulation obtains in Jamaica at this day. It seems to be a very just and wise one. "When prisoners in execution have nothing to maintain themselves, upon oath thereof before two neighbouring justices of peace, and notice to all their creditors, ten days before the supreme courts, they shall be publicly let to hire at the said courts; and the monies arising from the hire shall be paid to such persons as the creditors shall appoint, to be equally divided among the creditors. If any creditor shall refuse to consent that the prisoner shall be let to hire, such creditor shall pay the prisoner 3 s. 6 s. weekly." See Leslie's account of Jamaica, printed 1739.

earn a guinea a-day, becomes bankrupt, it is surely reasonable, that his creditors should have it in their power to make him work, in order to operate their payment. When such a man sues a *cessio bonorum*, though he makes a surrender of all bonds, bills, &c. due to him; yet he does not make a surrender of the most valuable of all his effects, viz. his skill. This was indeed in some measure guarded against by our old law; according to which, “he
“ who sues a *cessio bonorum* must swear in
“ court, that he has no goods or gear above
“ five shillings and a plack; and that he
“ shall not retain of his winning but two
“ pennies for his sustenance, and shall
“ give every third penny for the payment
“ of his debts.” See Abridgment of our statute law, voce *Prisoner*.

The skill of an artificer is in law equiparate to money: hence, in a copartnery, *qui operas confert* is intitled to a dividend of the profits, as well as he who clubs his share in cash.

The maxim, That *qui non habet in ære luat in pelle*, has been justly disregarded,
both

both by our Scotch and British statutes; by which, for the most part, he who is unable to pay his fine is ordained to work for a certain time; which is allowing him to pay his fine by his work. If a man can neither pay nor work, the above maxim must of necessity take place; but if he can work, *habet in ere*: hence the objection to a witness, That he was not worth the king's unlaw, (ten pounds Scots), used to be repelled if he was a servant *.

When a man with us is, by the sentence of a judge, condemned in a fine, he is ordered to lie in prison till he pay it; which likewise must be the case when a statute imposes a fine, and makes no proviso for the defender's insolvency. Now, as a debtor *ex delicto* has not the benefit of a *cessio*, he must lie for ever in prison. In France this inconvenience is remedied, by the power which the judges have of altering punishments; and there are many instances of their having changed a pecuniary punishment into a corporal one, upon ap-

* Dict. voce *Witness*.

plication of the insolvent offender. There is one arret of the parliament of Paris* which makes a distinction. “ Pour l’a-
 “ mende ajugée au Roy, la peine pe-
 “ cuniaire peut être convertie en corpo-
 “ relle, quand le condamné est hors d’é-
 “ tat de satisfaire, *secus* pour celle de la
 “ partie civile. *Arret du p. de Paris du*
 “ 29. Avril 1595.” But there are many arrets which make no distinction at all. Thus, for example, “ Un gentilhomme
 “ condamné au bannissement, et en des a-
 “ mendes envers le Roy et la partie pour
 “ assassinat commis, et n’ayant dequoy
 “ payer, presenta sa requête en commuta-
 “ tion de peines. La cour le condamna
 “ aux galeres perpetuelles, et à faire a-
 “ mende honorable, ce qu’il executa †.” If a criminal has not wherewith to pay his fine, and has not the benefit of a *cessio*, the fine unavoidably resolves itself into a corporal punishment, *viz.* perpetual imprisonment; which is, perhaps, a far greater

* See the dict. des arrests, voce *Amende remise ou commuée*.

† Dict. des arrests, *ibid.* See also voce *Peine*.

punishment

punishment than was intended: therefore it seems not unreasonable, that the judges should have a power of changing a pecuniary punishment into a corporal one; or, more properly, of changing one corporal punishment into another. However, as our judges have no such power, the distinction in the above arret of the parliament of Paris will hold with us. Hence, if a man is condemned in a fine, of which so much goes to the king, and so much to the prosecutor, (a common distribution in our statutes*), if he can transact with the private party, he might obtain from the king a remission of the fine, either in whole or in part, or else an alteration of the punishment. But if he cannot transact with the private party, he must lie for ever in prison; because, by our law, the king's remission cannot prejudice the right of private persons. This is also the case of one who has got a pardon from the king for murder, but has not money to pay the assythment due to the

* As to which see Hawkins's pleas of the crown, vol. 2. p. 265. 266.

wife and children of the deceased; for the court of session lately refused the benefit of a *cessio* to a man in these circumstances*.

In England it is enacted, by 18. E. lif. 5. That “no informer or plaintiff
“shall or may compound or agree with
“any person or persons that shall offend,
“or that shall be surmised to offend, a-
“gainst any penal statute, for an offence
“committed or pretended to be commit-
“ted, but after answer made in court un-
“to the information or suit in that behalf
“exhibited or prosecuted; nor after an-
“swer, but by order or consent of the
“court in which the same information or
“suit shall be depending,” under the
pain of being set on the pillory, forfeiting
ten pounds, &c. There is another sta-
tute, viz. 21. Jac. I. 3. which lays a fur-
ther restraint upon such transactions. But
it is provided, that this act shall not extend
to any warrant or privy-seal directed by the
king to any justices having power to hear

* Nov. 12. 1751, Malloch.

and determine offences done against any penal statute, giving them power to compound for the forfeitures of any penal statutes depending before them, or any of them respectively, after plea pleaded by the defender. On which clause Hawkins * remarks, " It is said by Sir Edward Coke, (3. Inst. 178.), that such justices, by such warrant, &c. can make such composition for the use of the king only. However, it seems, that, by 18. Elis. they may give leave to an informer to compound with a defendant after plea pleaded."

O B S. XXXIX.

Witness.

MR Erskine †, treating of presumptions, gives the following, as an example of those who are *juris et de jure*. " The testimony of a witness," says he,

* Vol. 2. p. 280,

† IV. 2. 18.

" who

“ who forwardly offers himself without
 “ being cited, is, from a presumption of
 “ his partiality, rejected, be his character
 “ ever so fair.” And there are many decisions much to the same purpose *.

But it seems to be talking too strongly, to assert, that every ultroneous witness ought to be cast. A witness may very often know something that is decisive of a cause, and yet, possibly, neither pursuer nor defender has heard of him. Where, then, is the harm of his disclosing what he knows of the matter? A judge ought to determine *secundum allegata et probata*; but what if, from private knowledge, he is certain, that the party with whom the *allegata et probata* stand is in the wrong? “ Non alia proinde (says a great lawyer)
 “ in tali allegatorum ac scientiæ privatæ
 “ pugna superest, quam ut deponat judicis officium, jurato asserens, sibi de
 “ causa non liquere, ac veritatis detegendæ gratia *testis partes assumat* †.” Yet, as our decisions and Mr Erskine have word-

* Dict. vol. 2. p. 526.

† Voët comm. ad tit. de judic. n. 50.

ed their doctrine, he would be guilty of *proditio testimonii*, and his evidence would go for nothing.

O B S. XL.

Qualified oath.

“ **W** Here the quality (says Mr Er-
 “ skine*) does not import an extinc-
 “ tion of the debt, but barely a counter-
 “ claim or *mutua petitio*, against the pur-
 “ suer, it is held as extrinsic, and must be
 “ proved *aliunde*.” The reason is obvious:
 A pursuer may prove his libel by the defen-
 der’s oath, but the defender cannot prove
 his libel or counter-claim by his own oath;
 which would be the case if the quality of a
mutua petitio was intrinsic. I pursue you
 for L. 50; you say compensation; this is
 a *mutua petitio*: if you, the defender, had
 raised a process against me for this L. 50,
 you could not have proved the libel by

* IV. 2. 5.

your own oath, neither can you do it upon my reference; because I only refer my own libel, not yours, to your oath.

O B S. XLI.

Effect of a capital sentence.

DIrleton doubts, “ If, after a capital
“ sentence, the person condemned
“ be *in legitima potestate*, seeing he can-
“ not be said to be *in leſto*, and the sen-
“ tence doth not affect *immobilia*.” Stewart * answers, “ A person condemned can-
“ not be said to be in *liege pouſtie*, being,
“ as they ſay, a ſon of death, and his
“ life merely precarious. Yet, if he
“ ſhould eſcape from execution, eſpecial-
“ ly into freedom and ſafety, that may be
“ thought to alter the caſe, and his deed
“ *quoad* his heritage would be more pro-
“ bable.”

This notion, that a perſon condemned

* Stewart's answers, p. 181. *initic.*

to die has not the disposal of his heritage, seems to be altogether chimerical. In order to reduce a disposition *ex capite lecti*, it must be proved, in the *first* place, that the disponent was sick at the time of signing it; *2dly*, that he died of that disease which occasioned his sickness at that time. From this principle it is plain, that though a sick man disposes his heritage to a stranger, and afterwards be condemned to die, and executed within the sixty days; yet the disposition would not be reducible on the head of deathbed; because he died, not of any disease, but by accident.

Lord Bankton admits, that this case is not within the statute 1696, which, he owns, concerns only those who are on sickbed; but he says, "By analogy, from
 " the law of deathbed, I should think,
 " that, unless a pardon be obtained, the
 " deed should fall, as being by one that
 " is not *sui juris*, has not the mastery of
 " himself; for a person cannot be considered as having the freedom of acting,
 " who is condemned to a capital punishment
 O " ment

“ment *.” Why so? Not, surely, because he is in jail; for a man imprisoned on any other account, has not the mastery of himself, more than he. It is indeed true, that the law presumes a man on sick-bed will not have the mastery of himself; for reduction *ex capite lecti* was introduced by the legislature, “from its jealousy
“of the weakness of mankind while
“under sickness, and of the importunity
“of friends in that conjuncture †.” But how is it possible, that this can apply to a man who is in perfect health, who is, when in prison, and under sentence of death, no more, nay rather less, exposed to the solicitation of friends, than if he were living in his own house? If a man in such melancholy circumstances, should dispoſe his heritage to the king, to the keeper of the prison, or to any other person, who had influence enough to save his life, or to make it uneasy to him, for the short time he is permitted to enjoy it; in any of these cases, his not having the mastery of

* II. 302. 33.

† Ersk. III. 8. 46.

himself,

himself, might be thought to afford some pretence for reducing the deed ; but it ought not to hurt any other disponse, who is not to be presumed to have used unjustifiable methods to obtain it.

Lord Dirleton says, that the sentence only affects moveables, not heritage ; but, according to this notion, it affects both. The moveables go to the king, and the heritage to the heir at law, which is the consequence of taking the power of alienation from the person condemned to die.

Though this notion be drawn from the Civil law, and embraced by Craig, and received in some other countries* ; yet as with us the sentence of death only affects the moveables of the person condemned to die, and as he is not within the act 1696, nor yet disabled by any other statute, it cannot be held to be the law of Scotland, that a person under sentence of death has not the disposal of his real estate.

* Dict. des arrests, voce *Condamné*, tom. 1. p. 494.

O B S. XLII.

Execution of a capital sentence.

IF a criminal, after he has been hanged, and cut down from the gibbet, be not dead, but only stupified, a notion universally prevails among the common people, that he cannot be hanged over again : nor is their opinion without foundation ; for, by the Regiam Majestatem *, “ Gif ane
 “ theif is hanged up upon the gallous, and
 “ fallles down fra the famine, he sould be
 “ quite thereafter of that thift. Bot the
 “ hangman, quha sould have hanged him,
 “ sall make fine with the king, saifand to
 “ him his life, his members, and his he-
 “ ritage, albeit that be ane exceiding great
 “ fault.” Yet as the sentence, according to the form at present, bears, that he shall be hanged till he be dead, a contrary conclusion may be drawn from it.

* Lib. 4. chap. 19.

Thus

Thus Voet *, “ An autem fur, rupto la-
 “ queo decidens, iterum suspendendus
 “ sit, dubitatum olim; at nunc dubitatio-
 “ nem omnem tollit vulgata sententiæ for-
 “ mula, qua sic damnantur ad patibulum,
 “ *ut mors sequatur.*”

Perhaps the following distinction would not be amiss: If by the fault of the executioner, or of the magistrate who superintends the execution, the criminal happens not to be dead after he is cut down, it would seem, that the decision of the Regiam Majestatem ought to be followed, otherwise it would be in the power of the executioner or magistrate, to make him suffer the pains of a thousand deaths. But if the criminal falls down from the gallows alive, by the casual breaking of the rope, or some other unforeseen accident, he must notwithstanding submit to his fate †.

The

* Comm. ad tit. de pœnis.

† It may be thought, that in the passage of the Regiam Majestatem quoted above, the case of the thief is only put, *exempli gratia*. About thirty-five

The vulgar likewise imagine, that a criminal cannot be put to death, after the hour fixed by the judges for his execution is past; which is altogether a mistake. He, no doubt, cannot be deprived of his life

a

years ago, one Margaret Dickson was sentenced to die for the murder of her own adulterous child, and hanged accordingly. When she was cut down from the gibbet, she was dead to all appearance; and therefore her friends were suffered to carry her off in a cart. While they were upon the way, she discovered some symptoms of life; and, upon proper remedies being used, perfectly recovered; nor was there any attempt made to execute her again. This woman's husband, notwithstanding all that happened, inclining to take her home, consulted his parish-minister; who would not allow him to cohabit with her, till they were married over again; which was certainly being over scrupulous; for the resolute condition in the marriage-contract, *till death shall part you*, had not existed. Had she once been actually dead, and then, like Lazarus, restored by a miracle to life, there can be no doubt that the marriage was dissolved; and that any woman her husband might have married, during the period betwixt her death and resurrection, would have been his lawful wife. It is a pretty curious question, if Lazarus, after his resurrection, could

a moment before the fatal hour arrives; but the longer the delay is after that time, the greater favour is done him. It would seem however, that no criminal ought to be executed in the dark *; for there would be some risk, that an innocent person, either from accident or design, might be made to suffer for the guilty. Besides, the great design of a public execution, is to strike terror into the spectators: now, this end of it would be lost, if it was gone about in the dark, because the multitude could not behold the unhappy sufferer.

could have reclaimed his effects from those to whom he had granted a disposition of them, to take effect after his death? This question was first started by Brown, *de relig. medici*, § 20. It was afterwards discoursed of at great length by one Verduyn, in a book intitled, *Disquisitio jurid. de testam. et heredit. Lazari bis mortui, et aliorum bis mortuorum*. Such an extraordinary case, no doubt, called for an extraordinary remedy; and therefore Puffendorff's determination, which is in favour of Lazarus, is certainly just. See *Droit de nature et des gens*, III. 6. 6. and Barbeyrac's notes.

* Excepting such as have been guilty of shocking unnatural crimes.

OBSE R.

O B S E R V A T I O N S

O N

Some Points of the Jewish Law.

O B S. I.

Of the Law.

“ **O**bligatio singulorum (says Heineccius) ad legem servandam,
 “ ex pacto quidem est; sed eo,
 “ quo semel in legislatariam summi imperantis potestatem consenserint, non quo
 “ singulas leges speciatim approbat*.”

The *original contract* between God and the Jews is recorded in Exodus†. Moses was commanded to tell them, that if they obeyed the Lord, they would be to him a peculiar treasure above all people, a kingdom of priests, and an holy nation.

* Pand. pars 1. § 94.

† c. 19.

Moses

Moses accordingly laid this proposal before the elders of the people, who all in one voice consented to the theocracy, and promised to regulate their conduct by the laws which God should prescribe. So that we may well apply to the law of Moses, that passage of Demosthenes, which is thus translated by a Roman lawyer. “ Lex
“ inventum ac munus Dei est; decretum
“ vero prudentum hominum, communis
“ sponsio civitatis *.”

We are told, that Moses wrote the law in a book, which was deposited in the ark. Some think, that had this book been transmitted to us, we would have found, that in it the law was more properly arranged, and more fully explained, than it is in the four last books of the Pentateuch. Be this as it will, the manners, bargains, and customs, which are often very minutely described in Genesis, discover to us many parts of the patriarchal law, of which, it is plain, Moses has transcribed some into his system, and others have been continued in force by the practice

* L. 2. ff. de leg.

of the people. Thus, for example, the law of Moses, which ordains a man to marry the wife of his brother, who died childless, appears evidently, from the story of Judah and Tamar *, to be *tralatium*. And it is owing to a circumstance of Jacob's wrestling, that "the children of Israel eat not of the sinew which shrank, which is upon the hollow of the thigh, unto this day; because he touched the hollow of Jacob's thigh †."

The law of Moses is to be promulgated, by reading it publicly ‖, by inculcating it privately, and by inscribing it on great stones, to be erected for that purpose **, "very plainly," *i. e.* as a Roman lawyer would have expressed it, *unde de plano recte legi posset* ††.

* G. xxxviii. 8. 9/14. 26.

† G. xxxii. 32.

‖ D. xxxi. 10. 11. 12. vi. 6. 7. 8. 9.

** D. xxvii. 2. 8.

†† L. 13. § 1. ff. de instit. act.

O B S. II.

Of jurisdiction and judges.

FOR some time after the Israelites left Egypt, Mofes determined all caufes in perfon; but at length, by the advice of Jethro his father-in-law, he “chofe
“able men out of all Ifrael, and made
“them heads over the people, rulers of
“thoufands, rulers of hundreds, rulers
“of fifties, and rulers of tens; and they
“judged the people at all feafons: the
“hard caufes they brought unto Mofes,
“but every fmall matter they judged
“themfelves*.”

Thus what are called *relationes* in the Roman law were eftablifhed by Mofes.
“Relatio eft quando judex, re ad princi-
“pem delata, ex ejus concilio judicat †.”
Thefe *relationes* are not unknown to our ecclefiastical courts; for it is very common for the prefbytery to refer a caufe to the

* E. xviii. 25. 26.

† Hein. Pand. vii. § 260.

fynod,

synod, and for the synod to refer it to the general assembly. Causes taken to report by the Lord Ordinary, are likewise something analogous to them.

“Thou shalt not revile the gods, nor curse the ruler of thy people *.”

It is not uncommon for a man who has lost his cause, to burst into passionate expressions against the judge. The text just now quoted was probably intended to check such indecencies. There is a law in the Pandects very much to the same purpose: “*Illud sciendum est, eum qui provocavit non debere conviciari ei a quo appellat; cæterum oportebit eum plecti; et ita divi fratres rescripserunt †.*”

When *falsing of dooms* was in fashion with us, very injurious and reproachful expressions were by statute made the *solemnia verba* of protesting for appeal, 1429. c. 116.; but afterwards these hard words were abolished, and more becoming ones substituted in their place, 1503. c. 99.

* E. xxii. 28.

† L. 8. ff. de appell.

O B S. III.

Distinction of persons.

“**T**HE woman shall not wear that
 “ which pertaineth unto a man,
 “ neither shall a man put on a woman’s
 “ garment *.”

If the sexes were allowed to dress indiscriminately, many very ridiculous and dangerous consequences would ensue: and therefore, if a man should go about in the habit of a woman, or a woman in that of a man, they ought to be punished, either as being guilty of falsehood, of which their crime is a species, or otherwise according to the circumstances of the case †.”

The

* D. xxii. 5.

† “ D’ailleurs il est deshonnête, même selon
 “ le droit naturel, qu’un homme se serve d’un
 “ ajustement, qui, en vertu d’une coutume fort
 “ ancienne, sert à distinguer le sexe féminin d’avec
 “ le masculin.” See Barbeyrac, note 4. on § x.
 liv. v. c. 3. *Droit de nature et des gens.* So that

The author of the *Causes Celebres* informs us, that a French woman, who had been declared an hermaphrodite, in whom the male sex was prevalent, by some unskilful surgeons, was ordained, by the magistrate of the town in which she lived, “quelle le se nommeroit Arnaud de Ma-
“laure, et seroit habillé en homme, avec
“defenses de prendre l’habit de femme,
“à peine de fouet *.”

In masquerades, and on the theatre, such disguise is assumed with impunity; because it is dropt when the entertainment is over, and consequently no body can be deceived or hurt by the metamorphosis.

there is no necessity for seeking a reason for this law from some of the Heathen customs, with Spencer, *de legibus Hebræorum*, lib. 2. c. 17.

* See the case intituled, *Fausse hermaphrodite*.

OBS.

O B S. IV.

Slaves.

THE power of masters and parents amongst the Hebrews seems to have been originally as unlimited, but, in process of time, to have been nearly as much retrenched, as it was amongst the Romans.

In the early ages of Rome, slaves were considered, not as persons, but things, and abandoned by the law to the capricious tyranny of their masters. The slaves of the patriarchs were treated much in the same manner. When Sarah complained to Abraham of Hagar, his answer was, “Be-
“ hold thy maid is in thy hand, do to her
“ as it pleaseth thee ;” so that it is plain, he looked upon her as a *res mancipi*. From this passage we may also gather, that the wives of the patriarchs had a *peculium*, as the wives of ancient Rome. Hagar was a *servus peculiaris* ; and the maids of Rebecca, Leah, Rachel, &c. no doubt, were of the same kind.

The Roman masters, under the emperors, were deprived of the power of life and death, which they formerly had over their slaves, and allowed only to chastise them for their misbehaviour. “ Ex constitutione divi Antonini, qui sine causa servum suum occiderit, non minus puniri jubetur quam si alienum servum occiderit. Sed et major asperitas dominorum ejusdem principis constitutione coercetur. Nam Antoninus consultus a quibusdam præsidibus provinciarum de his servis qui ad ædem sacram vel ad statuam principum confugiunt, præcepit, ut, si intolerabilis videatur sævitia dominorum, cogantur servos suos bonis conditionibus vendere, ut prætium dominis daretur; et recte; expedit enim reipublicæ ne sua re quis male utatur *.”

Moses reduced the power of masters under the following regulations. “ If a man smite his servant or his maid with a rod, and he die under his hand, he shall be surely punished; notwithstanding-

* § 2. Inst. de his qui sui.

“ ing, if he continue a day or two, he
 “ fhall not be punifhed, for he is his mo-
 “ ney. And if a man fmite the eye of
 “ his fervant, or the eye of his maid, that
 “ it perifh, he fhall let him go free for
 “ his eye’s fake : and if he fmite out his
 “ man-fervant’s tooth, or his maid fer-
 “ vant’s tooth, he fhall let him go free
 “ for his tooth’s fake *.”

The beating out a flave’s eye would probably have been reckoned *intolerabilis ſævitia* by the Roman lawyers; for “ vul-
 “ neris magnitudo atrocitatem facit, ali-
 “ quando *locus* vulneris, veluti *oculo per-*
 “ *cuffo.*” l. 8. ff. de injur. But they would have differed from Mofes about the beating out of a fervant’s tooth; becaufe, “ Cui
 “ dens abeft, non eft morbofus; magna e-
 “ nim pars hominum aliquo dente caret, ne-
 “ que ideo morbofi funt, præfertim cum
 “ fine dentibus nascimur; nec ideo minus
 “ fani fumus, donec dentes habeamus, alio-
 “ quin nullus ſenex ſanus eſſet.” l. 11. ff. de ædil. edicto.

* E. xxi. 20. 21. 26. 27.

All slaves who were Hebrews, and not strangers, were *statu liberi*; they became free at the jubilee *. *Statu liberi* are defined to be *qui statutum in tempus vel conditionem libertatem habebant*.

Servi vicarii seem to have been known even in Noah's time: he says, "Curfed
" be Cham, *a servant of servants* shall he
" be unto his brethren †."

O B S. V.

Parents and Children.

IT may be concluded, from Jacob's bargain with Laban || about his two daughters, that in those days a father had the power of selling his children.

It would likewise seem, that fathers had the power of life and death over their children at that time: for Reuben, that he might persuade his father to permit Benjamin to go along with the rest of his bre-

* L. xxv. 40.

† G. ix. 25.

|| G. xxix. 15, 18.

thren to Egypt, fays, " Slay my two fons
" if I bring him not to thee *."

The power of the Roman fathers, which was at firft absolute and defpotic, was greatly curtailed by the emperors, who reduced it to the power only of correction. Mofes introduced a like reformation amongft his countrymen †.

Upon reading the ftory of Schechem and Dinah, one is apt to imagine, that, by the patriarchal as well as by the Roman law, the marriage of a child was null without the antecedent confent of the father. As Shechem had Dinah in his power, and had debauched her, it is impoffible to believe, that ſhe would have refufed to marry him. It is the confent of her father which he labours to obtain: " Ask he never fo much dowry and gift, I will give
" according as ye || ſhall ſhall ſay unto
" me;

* G. xlii. 37.

† D. xxi. 18. 19.

|| From the plural number being here uſed, and from the fons of Jacob answering Shechem, ſome have been led to think, that the confent of brothers was required rather than that of parents.

But

“ me; but give me the damsel to wife* ;” which demonstrates, that he imagined the consent of the father was necessary to make a valid marriage. Yet there are several other passages in scripture that seem to defeat this doctrine. We read, that Esau “ took to wife Judith the daughter of “ Beeri the Hittite, and Bashemath the “ daughter of Elon the Hittite, which “ were a grief of mind to Isaac and to “ Rebecca †. This supposes that the marriage was valid. There is another ob-
stant text: “ Rebecca said to Isaac, I am “ weary of my life, because of the “ daughters of Heth; if Jacob take a “ wife of the daughters of Heth, such as

But it is plain from the whole passage, that Jacob's consent was sought, not theirs. In verse 6. it is said, “ And Hamar the father of Shechem went “ out unto Jacob to commune with him; ” and in verse 17. it is said, “ If ye will not hearken unto “ us to be circumcised, then we will take *our* “ *daughter*,” not our sister. From which it appears, that they treated in their father's name. See Crit. exp. of the Pent.

* G. xxxiv. 12.

† G. xxvi. 34. 35.

“ these

“ these which are of the daughters of the
 “ land, what good shall my life do to
 “ me*?” which likewise seems to sup-
 pose, that Jacob could marry without the
 consent of his father. However, Moses,
 in a case precisely the same with Dinah’s,
 makes the father’s consent absolutely ne-
 cessary. See E. xxii. 16. 17.

That the paternal power was ended,
 and the children forisfamiliarized by mar-
 riage, may be inferred from the text,
 which says, “ Therefore shall a man leave
 “ his father and his mother, and cleave
 “ unto his wife†.”

“ Thou shalt not seethe a kid in his
 “ mother’s milk‡.” This, in the opi-
 nion of some, was enacted in contradiction
 to a Heathen rite or ceremony** ; but
 the shocking barbarity of seething a kid,
 or indeed any other creature, in its mo-
 ther’s milk, was of itself a sufficient rea-
 son for the prohibition. I find a very in-

* G. xxvii. ult.

† G. ii. 24.

‡ D. xiv. 21.

** See Spencer, *de legibus Hebræorum*, lib. 2.
 c. 8.

genious allegorical explication of this text in one of the speeches in parliament, occasioned by the famous case of ship-money: “ You may please to remember, “ (says Mr Waller), that in the old law “ they are forbid to see the a kid in his “ mother’s milk; of which the received “ interpretation is, that one should not use “ that to the destruction of any creature, “ which was intended for its preservation “ tion *.”

O B S. VI.

First born.

“ **I**N case (says Lord Bankton) two sons “ are born at one birth, and it cannot “ be proved which of them was first “ brought forth, the question is, How “ the estate shall go? It would seem most “ probable, that, since the primogeniture, “ that would give the privilege to the one

* See the state-trials, vol. 5. p. 303.

“ over the other, cannot be proved, they
 “ must be conjoined in the succession *.”

There seems to be an inaccuracy in the
 expression here; for when two males are
 born at one birth, and when it can be pro-
 ved which of them came first into the
 world, the elder is preferred to the young-
 er; because he was first born, not because
 he was first begotten; by birthright, not
 by primogeniture.

We read in sacred history, that when
 Tamar was in labour, “ twins were in her
 “ womb; and it came to pass when she
 “ travailed, that the one put out his hand,
 “ and the midwife took and bound upon
 “ his hand a scarlet thread, saying, This
 “ came out first: and it came to pass, as
 “ he drew back his hand, that behold his
 “ brother came out; and afterwards came
 “ out his brother that had the scarlet thread
 “ upon his hand †.” The child who put
 out his hand was, in the midwife’s opinion,
 the first born; and she judged rightly; for
 the first-born of every animal is defined by

* II. 294. n.

† G. xxxviii. 27. & seqq.

God himself to be “every thing that openeth the matrix in all flesh *.” Now, the child who thrust out his hand, opened the matrix, and consequently was the first born. The Civil law says, “Nati sunt “ *qui vivi ex utero prodierunt* †; but this definition will not enable us to decide which of Tamar’s twins ought to be reckoned to have come out first. It may be thought, that, from the analogy of l. 44. pr. d. de relig. the Roman lawyers would have looked upon the child whose head first came into the world as the first born, though he had drawn back, and not come completely out till his twin-brother had done so before him. Paulus, in the text just mentioned, gives it as his opinion, that if the different members of any corpse are buried in different spots, each of these spots does not become *religiosus*; but “illum “ (locum) *religiosum esse ubi quod est “ principale conditum est, id est, caput “ cujus imago sit unde cognoscimur.*”

* L. xviii. 15.

† Hein. Pand. I. § 126.

O B S. VII.

Of the Egyptian loan.

THE Israelites, when about to leave Egypt, borrowed “jewels of silver, and jewels of gold; and the Lord gave the people favour in the sight of the Egyptians *.”

These jewels they never restored, nor indeed had they any such intention when they asked a loan of them. The divine warrant which they had for this artifice, is the only true excuse that can be made for them. Some people say, that there were considerable arrears of wages due to them by the Egyptians, which they refused to pay, and therefore the Israelites were obliged to use this stratagem: but though all this were true, yet it would not justify the deceit, which cannot be

* E. xi. 2. 3.

Q

looked

looked upon as *dolus bonus*. Voet * very justly affirms, that he who refuses to restore what he has borrowed, is guilty of a more aggravated breach of faith, than a depositary who declines to return what was committed to his custody. “Non minus, imo magis fidem frangit, qui, accepto ac finito beneficio, non reddit quod se restitutum promiserat, uti id in commodato contingeret, quam qui, nullo accepto beneficio, sed potius præstito officio, declinat rei ex conventionem reddendæ restitutionem, quod in deposito fieret †.”

The

* Comm. ad tit. Comm. n. ult.

† There is a case something similar to that of the Israelites put in l. 27. D. de pign. act. “Pecenti mutuam pecuniam creditori, cum præ manu debitor non haberet, species auri dedit, ut pignori apud alium creditorem poneret: si jam solutione liberatas receptasque eas is, qui suscepit, tenet, exhibere jubendus est; quod si etiam nunc apud creditorem creditoris sunt, voluntate domini nexæ videntur. Sed, ut liberatæ tradantur, domino earum propria actio adversus suum creditorem competit.” Upon a principle of the like nature proceeds, if I am not mistaken, the decision observed by Falconer, vol. 1. N^o 129.

“Richard

The Israelites were commanded to borrow jewels of silver, and jewels of gold, probably with a view to the make of the ark, and the priest's dress; which were to be formed of very splendid materials, and embellished with the precious stones and metals. Accordingly, when the construction of the ark was begun, the people were desired to contribute; and they

“ Richard Inglis mariner wrote from London, to
 “ Janet Young his mother at Dunbar, that he intended to remit to her six guineas, if he knew
 “ of a proper method to do it; and she having
 “ thereupon advised Charles Fall merchant in
 “ Dunbar; Inglis, upon that advice, paid the money to Claud Johnston, Mr Fall's correspondent,
 “ either upon his draught on Mr Fall payable to Janet Young, or upon a receipt. Janet Young
 “ coming to demand the money, was told, that
 “ she was debtor to Mr Fall and company for
 “ house-rents by decreets, which behoved to compensate her claim. Some objections were made
 “ to the decret; but the point on which the Lords
 “ determined the cause, was, that Mr Fall having
 “ advised the remitting the money in this way,
 “ which was acknowledged by a petition in process, and which money was intended by the son
 “ for his mother's support, he was *in mala fide* to
 “ oppone the compensation.”

Q 2

came,

came, “both men and women, as many
 “as were willing-hearted, and brought
 “bracelets, and ear-rings, and rings, and
 “tablets, all jewels of gold *,” &c.

When a Hebrew slave became free, his master was ordered not to let him go away empty: “Thou shalt furnish him liberally out of thy flock, and out of thy floor, and out of thy wine-press: of that wherewith the Lord thy God hath blessed thee, thou shalt give unto him. And thou shalt remember, that thou wast a bondman in Egypt †.” Here there is a plain allusion to the Egyptian loan. As the Israelites, who had been bondmen in Egypt, got, when they departed from it, some of the most valuable things the Egyptians had; so they, when a slave left them, were commanded to give him part of the best things which their house should afford. Possibly the master was enjoined to favour the slave with these gratuities, that he might have something wherewith to begin the world anew, and maintain a fami-

* E. xxxv. 22.

† D. xv. 13. 14. 15.

ly. The same reason gave rise to the edict of the Roman prætor, *Quod cum eo qui in aliena potestate est, &c.* “ Ratio indulgendi filio hoc competentix
 “ beneficium videtur fuisse, ut filio succurreretur novam familiam instituenti,
 “ cujus caput futurus est, ad quod multa
 “ impendia desiderantur *.”

O B S. VIII.

Sale.

THough the law of Moses is far from being full upon this contract, yet as we have in Genesis an account of many sales, we may learn the principles upon which the patriarchs bought and sold, and by which, no doubt, their posterity were guided in their dealings.

Abraham, when buying the cave of Machpelah † from Ephron, says, “ For
 “ as much money as it is worth he shall

* Voet, comm. ad tit. Quod cum eo, n. ult.

† G. xxiii. 9. & seqq.

“ give it me ;” and upon Ephron’s telling him it was worth 400 shekels of silver, he “ weighed to Ephron the silver which “ he had named in the audience of the “ sons of Heth, 400 shekels of silver, “ *current money with the merchant.*” Hence we see it was Abraham’s notion, that *præteritum debet esse verum, justum, certum, et in pecunia numerata consistere*, which are its requisites by the Civil law.

From the unequal bargain betwixt Esau and Jacob, by which the former sold his birthright to the latter for a mess of pottage *, it may be conjectured, that *læsio enormis* was no more a ground of voiding a bargain amongst the patriarchs than it is with us. By the law of Moses, “ If thou “ sell ought unto thy neighbour, or buy- “ est ought of thy neighbour’s hand ; ye “ shall not oppress one another † :” that is to say, sale is a contract *bonæ fidei* ; and perhaps this text meant to derogate from the former practice, and make *læsio enormis* a good ground of reduction.

* G. xxvi. 19. & seqq.

† L. xxv. 14.

O B S. IX.

De acquirendo rerum dominio.

AFTER the flood God said to Noah,
 “ The fear of you, and the dread
 “ of you shall be upon every beast of the
 “ earth, and upon every fowl of the air,
 “ upon all that moveth upon the earth,
 “ and upon all the fishes of the sea; *into*
 “ *your hand are they delivered* *.” That
 is, in other words, “ Traditionibus, non
 “ nudis pactis, dominia rerum transferun-
 “ tur,” l. 2. C. de pactis.

O B S. X.

Mandate.

“ **T**HE Lord said unto Moses, Lo,
 “ I come in a thick cloud, that

* G. ix. 2.

“ the

“ the people may hear when I speak with
 “ thee, and believe thee for ever *.”

This was in effect giving a tacit mandate to Moses ; for such mandate is understood,
 “ si quis præsens negotia sua geri patitur,”
 l. 53. ff. de mandato.

Abraham gave his servant a commission to get a wife for his son Isaac † : A commission of the like nature occurs in l. 34. pr. d. de R. N. “ Generali mandato quæ-
 “ rendi mariti filiæ familias, non fieri
 “ nuptias, rationis est : itaque personam
 “ ejus patri demonstrari, qui matrimonio
 “ consenserit, ut nuptiæ contrahantur, ne-
 “ cesse est.”

O B S. XI.

Servitude.

“ **L**egal servitudes (says Mr Erskine)
 “ are established by statute or cu-
 “ stom, from considerations of public po-

* E. xix. 9.

† G. xxiv.

“ licy;

“ licy; among which may be numbered
“ the restraints laid upon proprietors of
“ tenements within the city of Edinburgh,
“ by 1621, c. 26. & 1698, c. 8.” *

A legal servitude was imposed by Moses
on all houses: “ When thou buildest a
“ new house, then thou shalt make a bat-
“ tlement for thy roof, that thou bring
“ not blood upon thine house, if any man
“ fall from thence †.”

O B S. XII.

Of Vows.

“ **I**F a woman also vow a vow unto the
“ Lord, and bind herself by a bond,
“ being in her father’s house, in her
“ youth; and her father hear her vow,
“ and her bond wherewith she has bound
“ her soul, and her father shall hold his
“ peace at her: then all her vows shall
“ stand, and every bond wherewith she

* II. 9. 1.

† D. xxii. 8.

“ hath

“ hath bound her soul, shall stand. But
 “ if her father disallow her in the day
 “ that he heareth, not any of her vows,
 “ or of her bonds wherewith she hath
 “ bound her soul, shall stand: and the
 “ Lord shall forgive her, because her fa-
 “ ther disallowed her *.” The same dis-
 tinction is made as to the vows of a wife.
 L. 16. ff. ad Set. Maced. bears some re-
 semblance to this constitution of Moses:
 “ Si filius familias, absente patre, quasi
 “ ex mandato ejus pecuniam acceperit,
 “ cavisset, et ad patrem literas emisit, ut
 “ eam pecuniam in provincia solveret:
 “ debet pater, si actum (filii sui) impro-
 “ bat, *continuo* testationem interponere
 “ contrariæ voluntatis.”

O B S. XIII.

Deathbed.

“ **A**ND Israel said unto Joseph, Be-
 “ hold, I die; but God shall be

* N. xxx.

“ with

“ with you, and bring you again unto the
 “ land of your fathers, Moreover, I
 “ have given you a double portion above
 “ thy brethren, which I took out of the
 “ hand of the Amorite, with my sword
 “ and with my bow *.”

This passage has induced many to believe, that, in Jacob’s days, conquest might have been disposed *ad libitum* on deathbed.

“ In sacra historia, (says Craig †), Jacobus
 “ patriarcha, agrum quem ab Amorrheo
 “ arcu et gladio justo bello acquisiverat,
 “ Josepho extra sortem reliquit; unde
 “ plerique non obscure colligunt, licere,
 “ in conquæstu, primogenito liberorum
 “ præjudicare, et conquæstum cui velit pro
 “ arbitrio relinquere.”

* G. xlviii. 21. 22.

† Lib. 2. tit. 1. § 10.

O B S. XIV.

Theft.

“ **W**hen thou comest unto thy neighbour’s vineyard, then thou
 “ mayst eat grapes thy fill, at thine own
 “ pleasure; but thou shalt not put any in
 “ thy vessel. When thou comest into the
 “ standing-corn of thy neighbour, then
 “ thou mayst pluck the ears with thine
 “ hand; but thou shalt not move a sickle
 “ unto thy neighbour’s standing-corn *.”

Some restrict this permission to poor labourers who wrought in the vineyards, and who, say they, have surely as good a title to eat grapes, when working at the vintage, as the ox has to eat the corn when treading it out; and they understand 1 Cor. ix. 7. as being an allusion to this law: “ Who planteth
 “ a vineyard, and eateth not of the fruit
 “ thereof? or who feedeth a flock, and eat-

* D. xxiii. 24. 25.

“eth not of the milk of the flock?” But others, with more justice, extend this law to all travellers, whom they allow to step into a field or vineyard, and take what is necessary for their refreshment.

This law seems to treat *de furto rei minimæ*. Some things are of a value so trifling and inconsiderable, that it would be absurd and ridiculous to punish him who steals them as a thief. The intention of this law was, to fix, in some measure, what these things were.

Bynkershoek, a Dutch lawyer, in one of his Observations, which is intitled, *De furto rei minimæ*, gives it as his opinion, that the *actio furti* is not competent against him who steals mere trifles, because it brands with infamy every person whom it reaches; and therefore he, in this case, allows only of an action upon the case (*in factum*) for restitution, and very properly adduces in support of this notion, *L. 3. § ult. L. 10. 11. ff. de dolo malo*. Which texts refuse the *actio de dolo*, “*si modica summa sit;*” because the *actio de do-*

R

le

to likewise carries infamy along with it*.

That

* Quoniam non duntaxat res magni momenti in privatorum esse solent patrimonio, verum et minimi, harum quoque furtum fieri credendum est, cum omnis rei alienæ esse queat furtum. Quod adeo verum est, ut non modo qui alienam gallinam subtraxerit, fur sit, § 16. *Inst. de R. D.*; sed et qui ex aliena cisterna aquam hauserit, *L. 21. § 5. ff. de furt.* Quam furti speciem nostra memoria exercitam, et magnas de ea turbas vidi. Quam vero, ob infamiæ notam, gravior sit furti condemnatio, quam ut ob rem minimam obtinere videatur posse, furti actionem eo nomine dandam non existimem. Quamvis igitur largiamur furtum etiam minimorum esse, non tamen continuo largimur, ob ea quæ minimi sunt actionem furti dandam. Fortissimum autem ejus sententiæ argumentum est in actione de dolo, quæ commisso licet dolo, non tamen passim indulgetur nec in primis, *si modica summa sit, L. 3. § ult. L. 10. 11. ff. de dol. mal.* Quod doli actio sit famosa, nec est ut temere projiciamus existimationes hominum, non prodita, ut diximus, ullibi ob furtum minimorum actione furti; neque enim præcise licet colligere, fur est, ergo furti tenetur, cum teneantur quoque furti qui fures non sunt, et contra. Qui spicas vellunt, si in agris juxta viam aut per quod s iter est, fures non sunt, si animi gratia vellant, ut fere est prætereun-
tium consuetudo; sed si lucri gratia, fures sunt, quamvis furti non teneantur. In vellicationem e-
quidem

That passage of *Regiam Majestatem* *, which is commonly called *The law of Burdenfeck*, is very much of Bynkershoek's way of thinking. By it, he who steals a sheep or calf, or as much meat as he can carry on his back, is not liable to an accusation for theft, but only to an action for restitution. "For the thift of ane calfe, or of
" ane fcheip, or for fa meikil meat as ane
" man can beare upon his back, na court
" fould be halden (to punishe the doer
" heirof as ane theif); bot he in quhais land

quidem consensisse videntur, qui ad viam ferunt; at ille consensus vellicantem, si lucri causa vellat, non a furto absolvit, sed ab actione furti, *arg. l. 46. § 8. ff. de furt.* Qui ex agro non ad viam, lucri ergo, vellant, fures sunt; nec civiliter esse desinunt, quamvis ob famem vellant. Quod autem generaliter absolvantur, in *C. 26. de conserv.* Distinct. v. ex jurisprudentia Judaica est, ut Moses docuit, *libro v. c. xxxiii. § 25.* nisi dicas absolvi, quatenus sabbathum non violarint, ut hæc suggerunt evangelia, et *c. 4. x. de R. l.* Atque hæc ita ut probem ob furtum minimorum, non aliam actionem videri dandam quam quæ in factum est, &c. *Obs. lib. 1. obs. 3. p. 20. et seqq.*

* Lib. 4. c. 16.

“ the thief is taken, shall have off him ane
 “ schein, or ane kow, and mair over, the
 “ thief shall be scourged ; because it is sta-
 “ tute, than na man shall be hanged for
 “ ane less fault then for twa schein,
 “ whereof ilk ane is worth saxtene pen-
 “ nies.” See further as to the question,
 How far necessity is an excuse for theft ?
 and as to this text from the law of Moses,
Hale's pleas of the crown, vol. 1. p. 54.
 55.

O B S. XV.

Holy oil.

“ **T**Hou shalt anoint Aaron and his
 “ sons, and consecrate them, that
 “ they may minister unto me in the priest's
 “ office. And thou shalt speak unto the
 “ children of Israel, saying, This shall be
 “ an holy anointing oil unto me through-
 “ out your generations. Upon man's flesh
 “ shall it not be poured, neither shall ye
 “ make any other like it, after the com-
 “ position

“ position of it: it is holy, and it shall be
 “ holy unto you. Whosoever compound-
 “ eth any like it, or whosoever putteth a-
 “ ny of it upon a stranger, shall even be
 “ cut off from his people *.

This holy oil was secreted from common
 use, with as much anxiety as the *sacrum*
encaustum with which the emperors sign-
 ed their rescripts, and which was made *co-*
eti muricis et triti conchylii ardore. “ Hanc
 “ autem sacri encausti confectionem nulli
 “ sit licitum aut concessum habere aut
 “ quærere, a quocunque sperare, eo vi-
 “ delicet, qui hoc aggressus fuerit tyran-
 “ nico spiritu, post proscriptionem bono-
 “ rum omnium, capitali non immerito pœ-
 “ na plectendo, l. 6. C. de divers. refer.

O B S. XVI.

High treason.

IT is evident from the whole strain of
 the Old Testament, that the great end

* E. xxx. 30. et seqq.

of bringing the Israelites out of Egypt, and of destroying the Canaanites, was to establish a nation which should embrace and preserve inviolate the belief and worship of the one true God. Before the law was delivered to Moses, the theocracy was solemnly settled in the manner narrated above *: so that it was a necessary consequence, that any injury or affront offered to the Supreme Being, behoved to be amongst the Jews, what the *crimen læsæ majestatis* is in other countries.

Majestas is the supreme power of every state †; hence he who is guilty of any offence against it, falls into the crime of treason. This *crimen læsæ majestatis*, was by the Roman law divided into *crimen perduellionis*, et *crimen majestatis*, taken in a more limited sense. He was guilty of the first who attempted any thing, *hostili animo*, against the safety of the supreme power. He was guilty of the second, who did any thing with an intention to dishonour and affront the supreme power, e. g.

* Obs. 1.

† Heinec. ff. h. t.

by demolishing the statues of the emperors, or speaking disrespectfully of them.

In the same way, he who instigated the people to serve other gods, he who followed wizards, or who was, or pretended to be himself a wizard, was guilty of the same crime, with what is called *perduellion* in the Civil law, and high treason with us: for, in reality, such persons were rebels, and set up another pretended supreme power, in opposition to the one already established by law; hence they were justly condemned to die. He who cursed God, was, for the same reason, to be put to death; but he who only takes the name of God in vain, is not adjudged to die. The law only says, *The Lord will not hold him guiltless*; that is, *Deum solum habet ultorem*; the punishment is not to be inflicted by men. And here we may apply the rule in *l. 7. § 1. ff. ad leg. Jul. maj. Nec lubricum linguæ ad pœnam facile trabendum est.* See likewise *Lunic. C. Si quis imper. maledix.*

As the crime of treason aims a blow at the very being of the state, it is deemed
the

the most atrocious of all crimes, and punished therefore with the most striking severity. By the constitution of Arcadius and Honorius, *nudum consilium*, the bare intention to commit treason, though it has not manifested itself by any overt act, nay *conscii silentium*, the concealing, and not discovering a treasonable purpose, which has been imparted to one, are both subjected to the pains of treason. Nor is the Jewish law less severe *. “If thy brother, the son of thy mother, or thy son, or thy daughter, or the wife of thy bosom, or thy friend, which is as thine own soul, entice thee secretly, saying, Let us go and serve other gods: thou shalt not consent unto him, nor hearken unto him; neither shall thine eye pity him, neither shalt thou spare, neither shalt thou conceal him.”

* D. xiii. 6.

O B S. XVII.

Murder.

“ **W** Hosoever slayeth Cain, vengeance shall be taken on him sevenfold*.”

It seems to be a necessary conclusion from this text, that, in the days of Cain, the punishment of murder was not capital, nor even corporal; for a man can die but once; and we may say of arbitrary corporal punishments what a Roman lawyer says somewhere of wounds, that they cannot be inflicted *ad modum et mensuram*; therefore it would seem, that it was pecuniary. In ancient times, the laws of most countries punished murder by a fine in money or goods. By the old laws of England, even he who killed the King might redeem his life, upon payment of a certain sum †.

“ If one (says Moses) be found slain

* G. iv. 15.

† See Hale's pleas of the crown, p. 7. and there the notes.

“ in the land, which the Lord thy God gi-
 “ veth thee to possess it, lying in the
 “ field, and it be not known who hath
 “ slain him; then thy elders and thy jud-
 “ ges shall come forth, and they shall mea-
 “ sure unto the cities which are round a-
 “ bout him that is slain. And it shall be
 “ that the city which is next unto the
 “ slain man, even the elders of that city,
 “ shall take an heifer, &c.— And all the
 “ elders of that city that are next unto the
 “ slain man, shall wash their hands over
 “ the heifer that is beheaded in the valley;
 “ and they shall answer and say, Our
 “ hands have not shed this blood, neither
 “ have our eyes seen it *.”

In this law Moses goes upon the pre-
 sumption, which is the foundation of *1mo*
Geo. I. c. 18.; by which statute it is pro-
 vided, That any person whose trees are
 spoiled or destroyed, shall recover satisfac-
 tion and recompense from the next parish,
 town, vill, hamlet, or place, unless the
 offender is, by the said parish, town, ham-

* D. xxi. 1. & seqq.

let, vill, or place, convicted within six months. A like presumption had been long before introduced into this country, by 1669, c. 16.; which enacts, That whatever damage is done to the highways, shall be esteemed and held as done by the labourers of the lands adjacent to the highways; who shall therefore be fined by the justices, reserving to them to call before the justices any others for their relief, who have been the real actors of the skaith. By the law of England, the town or vill in which a person is slain is amerced when the murderer escapes; if the town or vill is unable to pay the fine, the hundred is liable for it; in case the town and hundred are still not sufficient, the county must make it up. See Hale's pleas of the crown, vol. 1. p. 448. 449. See also Hawkins's pleas of the crown, vol. 2. p. 46. § 19. & p. 74. § 1. 2.



A
S Y S T E M
O F

The Judicial Law of MOSES.



B O O K I.

T I T L E I.

State and distinction of persons.

1. G. i. 27.

GOD created man after his own image,
in the image of God created he
him, male and female created he
them.

2. D. xxii. 5.

The woman shall not wear that which
pertaineth unto a man, neither shall a man

S

put

put on a woman's garment: for all that do so are abomination unto the Lord thy God *.

3. L. xix. 32.

Thou shalt rise up before the hoary head, and honour the face of the old man.

4. L. xxiv. 22.

Ye shall have one manner of law, as well for the stranger as for one of your own country.

5. D. xvii. 15.

One from among thy brethren shalt thou set king over thee: thou mayst not set a stranger over thee, which is not thy brother.

6. D. xxiii. 20.

Unto a stranger thou mayst lend upon usury, but unto thy brother thou shalt not lend upon usury.

7. D. xxiii. 7.

Thou shalt not abhor an Edomite, for he is thy brother: thou shalt not abhor an Egyptian, because thou wast a stranger in his land. § 1: The children that are begotten

* See Obs. III.

of

Tit. I. *the Judicial Law of Moses.* 3

of them, shall enter into the congregation of the Lord in their third generation *.

8. E. xxii. 21. 22. 23. 24.

Thou shalt neither vex a stranger, nor oppress him; for ye were strangers in the land of Egypt: ye shall not afflict any widow or fatherless child. § 1. If thou afflict them in any wise, and they cry at all unto me, I will surely hear their cry. § 2. And my wrath shall wax hot, and I will kill you with the sword; and your wives shall be widows, and your children fatherless.

9. D. xxiv. 19. 20. 21.

When thou cuttest down thine harvest in thy field, and hast forgot a sheaf in the field,

* *Thou shalt not abhor an Edomite, &c.*] so as never to make marriages with them, they being a circumcised people, and descended from Esau the twin-brother of Jacob, and consequently a kindred nation.

The Egyptians entertained the Jewish nation very hospitably for several generations, the memory of which benefit God would not have forgotten, though they were afterwards cruelly oppressed by them. Crit. exp. of the Pent.

thou shalt not go again to fetch it: it shall be for the stranger, for the fatherless, and the widow. § 1. When thou beatest thine olive-tree, thou shalt not go over the boughs again: it shall be for the stranger, for the fatherless, and for the widow. § 2. When thou gatherest the grapes of thy vineyard, thou shalt not glean it afterward: it shall be for the stranger, for the fatherless, and for the widow.

10. D. xiv. 28. 29.

At the end of three years, thou shalt bring forth all the tithe of thine increase the same year, and shalt lay it up within thy gates. § 1. And the Levite, (because he hath no part nor inheritance with thee), and the stranger, and the fatherless, and the widow, which are within thy gates, shall come, and shall eat, and be satisfied; that the Lord thy God may bless thee, in all the work of thine hand which thou doest.

T I T L E II.

Jurisdiction and Judges.

1. D. xvi. 18. 19.

JUDGES and officers shalt thou make thee in all thy gates, which the Lord thy God giveth

giveth thee throughout thy tribes ; and they shall judge the people with just judgment.

§ 1. Thou shalt not wrest judgment. § 2. Thou shalt not respect persons : § 3. Neither take a gift ; for a gift doth blind the eyes of the wise, and pervert the words of the righteous.

2. D. xvii. 8. 9. 11. 12. 13.

If there arise a matter too hard for thee in judgment, between blood and blood, between plea and plea, and between stroke and stroke, being matters of controversy within thy gates : then shalt thou arise, and get thee up unto the place which the Lord thy God shall chuse.

§ 1. And thou shalt come unto the priests the Levites, and unto the judge that shall be in those days, and inquire ; and they shall shew thee the sentence of judgment. § 2. According to the sentence of the law which they shall teach thee, and according to the judgment which they shall tell thee, thou shalt do : thou shalt not decline from the sentence which they shall shew thee, to the right hand nor to the left.

§ 3. And the man that will do presumptuously, and will not hearken unto the priest or unto the judge, even that man shall die : and thou shalt put away the evil from Israel. And all the people shall hear, and fear, and do no more presumptuously.

5. L. xix. 15.

Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt thou judge thy neighbour.

4. E. xxii. 28.

Thou shalt not revile the gods, nor curse the ruler of thy people *.

T I T L E III.

Slaves †.

1. L. xxv. 39.—44.

IF thy brother that dwelleth by thee be waxen poor, and be sold unto thee; thou shalt not compel him to serve as a bond-servant: § 1. But as an hired servant, and as a sojourner he shall be with thee, and shall serve thee until the year of jubilee. § 2. And then shall he depart from thee, both he and his children with him, and shall return unto his own family, and unto the possession of his

* See Obs. II.

† See Obs. IV.

Tit. 3. *the Judicial Law of Moses.* 7

fathers shall he return. § 3. For they are my servants, which I brought forth out of the land of Egypt: they shall not be sold as bondmen. § 4. Thou shalt not rule over him with rigour, but shalt fear thy God.

2. D. xv. 13. 14. 15. 18.

And when thou sendest him out free from thee, thou shalt not let him go away empty. § 1. Thou shalt furnish him liberally out of thy flock, and out of thy floor, and out of thy wine-press: of that wherewith the Lord thy God hath blessed thee, thou shalt give unto him. § 2. And thou shalt remember, that thou wast a bondman in the land of Egypt, and the Lord thy God redeemed thee: therefore I command thee this thing to-day. § 3. It shall not seem hard unto thee, when thou sendest him away free from thee; for he hath been worth a double hired servant to thee, in serving thee six years: and the Lord thy God shall bless thee in all that thou dost.

3. E. xxi. 3. 4. 5. 6.

If he came in by himself, he shall go out by himself. § 1. If he were married, then his wife shall go out with him. § 2. If his master have given him a wife, and she have born him sons or daughters; the wife and
her

her children shall be her master's, and he shall go out by himself. § 3. And if the servant shall plainly say, I love my master, my wife, and my children, I will not go out free; then shall his master bring him unto the judges; he shall also bring him unto the door, or unto the door-post: and his master shall bore his ear through with an awl; and he shall serve him for ever.

4. D. xv. 17.

And also unto thy maid-servant thou shalt do likewise.

5. L. xxv. 47.—55.

And if a sojourner or stranger wax rich by thee, and thy brother that dwelleth by him wax poor, and sell himself unto the stranger or sojourner by thee, or to the stock of the stranger's family: after that he is sold, he may be redeemed again. § 1. One of his brethren may redeem him: either his uncle, or his uncle's son, may redeem him, or any that is nigh of kin to him of his family, may redeem him; § 2. Or if he be able, he may redeem himself. § 3. And he shall reckon with him that bought him, from the year that he was sold to him, unto the year of jubilee: and the price of his sale shall be according unto

Tit. 3. *the Judicial Law of Moses.* 9

unto the number of years, according to the time of an hired servant shall he be with him.

§ 4. If there be yet many years behind ; according unto them he shall give again the price of his redemption out of the money that he was bought for. § 5. And if there remain

but few years to the year of jubilee, then he shall count with him, and according unto his years shall he give him again the price of his redemption. § 6. And as a yearly hired servant shall he be with him: and the other

shall not rule with rigour over him in thy sight. § 7. And if he be not redeemed in these years, then he shall go out in the year of jubilee, both he and his children with him. § 8. For unto me the children of

Israel are servants, they are my servants, whom I brought forth out of the land of Egypt.

6. L. xxv. 44. 45. 46.

Thy bondmen, and thy bondmaids, which thou shalt have, shall be of the Heathen that are round about you; of them shall ye buy bondmen and bondmaids. § 1. Moreover, of the children of the strangers that do sojourn among you, of them shall ye buy, and of their families that are with you, which they begat in your land. § 2. And they shall be
your

your possession. And ye shall take them as an inheritance for your children after you, to inherit them for a possession, they shall be your bondmen for ever : but over your brethren the children of Israel, ye shall not rule one over another with rigour.

7. E. xxi. 20. 21. 26. 27.

If a man smite his servant, or his maid with a rod, and he die under his hand ; he shall be surely punished. § 1. Notwithstanding, if he continue a day or two, he shall not be punished : for he is his money. § 2. And if a man smite the eye of his servant, or the eye of his maid, that it perish, he shall let him go free for his eye's sake. § 3. And if he smite out his man-servant's tooth, or his maid-servant's tooth, he shall let him go free for his tooth's sake.

8. E. xxi. 7. 8. 9. 10. 11.

And if a man sell his daughter to be a maid-servant, she shall not go out as the men-servants do. § 1. If she please not her master, who hath betrothed her unto himself, then shall he let her be redeemed : § 2. To sell her unto a strange nation, he shall have no power, seeing he hath dealt deceitfully with her. § 3. And if he hath betrothed her unto his son, he shall

Tit. 4. *the Judicial Law of Moses.* 11

shall deal with her after the manner of daughters. § 4. If he take him another wife; her food, her raiment, and her duty of marriage shall he not diminish. And if he do not these three unto her, then she shall go out free without money.

9. D. xxiii. 15. 16.

Thou shalt not deliver unto his master, the servant which has escaped from his master unto thee. § 1. He shall dwell with thee, even among you, in that place which he shall chuse, in one of thy gates where it liketh him best: thou shalt not oppress him.

T I T L E IV.

Parents and children.*

1. E. xx. 12.

HONOUR thy father and thy mother, that thy days may be long upon the land which the Lord thy God giveth thee.

2. D. xxi. 18. 19. 20. 21.

If a man have a stubborn and rebellious son, which will not obey the voice of his father,

* See Obs. V.

or the voice of his mother, and that when they have chastened him, will not hearken unto them : § 1. Then shall his father and mother lay hold on him, and bring him out unto the elders of his city *, and unto the gate of his place : § 2. And they shall say unto the elders of his city, This our son is stubborn and rebellious, he will not obey our voice; he is a glutton, and a drunkard. § 3. And all the men of his city shall stone him with stones, that he die : so shalt thou put evil away from among you.

3. L. xix. 29.

Do not prostitute thy daughter, to cause her to be a whore †.

* Neque nos in puniendis minorum vitiis potestatem in immensum extendi volumus, sed jure patrio auctoritas corrigat propinqui juvenis erratum, et privata animadversio compescat. Quod si atrocitas facti jus domesticæ emendationis excedat, placet enormis delicti reos dedi judicum notioni. *L. unic. C. de emend. propinq.*

† Si lenones patres et dominis suis filiabus vel ancillis peccandi necessitatem imposuerint, licet filiabus et ancillis; episcoporum implorato suffragio, omni miseriarum necessitate absolvi. *L. 12. C. de epif. aud. L. 6. C. de spectac. et Hein. inst. § 198.*

4. D. xiv. 21.

Thou shalt not see the a kid in his mother's milk.

T I T L E V.

Marriage.

1. G. ii. 24.

Therefore shall a man leave his father and his mother, and shall cleave unto his wife : and they shall be one flesh.

2. L. xviii. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 17. 16.

None of you shall approach to any that is near of kin to him *, to uncover their nakedness : I am the Lord. § 1. The nakedness of thy father, or the nakedness of thy mother, shalt thou not uncover. § 2. The nakedness of thy father's wife shalt thou not uncover. § 3. The nakedness of thy sister, the daughter of thy father, or daughter of thy mother, whether she be born at home, or born abroad, shalt thou not uncover. § 4. The

* See § 1. Inst. de nupt. and the title ff. de gradibus.

T

nakedness

nakedness of thy son's daughter, or of thy daughter's daughter, thou shalt not uncover. § 5. The nakedness of thy father's wife's daughter begotten of thy father (she is thy sister) thou shalt not uncover. § 6. Thou shalt not uncover the nakedness of thy father's sister. § 7. Thou shalt not uncover the nakedness of thy mother's sister. § 8. Thou shalt not uncover the nakedness of thy father's brother, thou shalt not approach to his wife. § 9. Thou shalt uncover the nakedness of thy daughter-in-law. § 10. Thou shalt not uncover the nakedness of a woman and her daughter, neither shalt thou take her son's daughter, or her daughter's daughter. § 11. Neither shalt thou take a wife to her sister, to vex her, to uncover her nakedness besides the other in her lifetime. § 12. Thou shalt not uncover the nakedness of thy brother's wife.

3. D. xxv. 5. 6. 7. 8. 9. 10.

If brethren dwell together, and one of them die, and have no child, the wife of the dead shall not marry without unto a stranger. § 1. Her husband's brother shall go in unto her, and take her to him to wife, and perform the duty of an husband's brother unto her. § 2. And it shall be, that the first-born which she beareth, shall succeed in the name of
of

Tit. 5. *the Judicial Law of Moses.* 15

of his brother which is dead, that his name be not put out of Israel. § 3. And if the man like not to take his brother's wife, then let his brother's wife go up to the gate unto the elders, and say, My husband's brother refuseth to raise up unto his brother a name in Israel, he will not perform the duty of my husband's brother. § 4. Then the elders of his city shall call him, and speak unto him: and if he stand to it, and say, I like not to take her: § 5. Then shall his brother's wife come unto him in the presence of the elders, and loose his shoe from off his foot, and spit in his face, and shall answer and say, So shall it be done unto that man that will not build up his brother's house. § 6. And his name shall be called in Israel, The house of him that hath his shoe loosed.

4. N. xxxvi. 8. 9.

And every daughter that possesseth an inheritance in any tribe of the children of Israel, shall be wife unto one of the family of the tribe of her father, that the children of Israel may enjoy every man the inheritance of his fathers. § 1. Neither shall the inheritance remove from one tribe to another tribe; but every one of the tribes of the children of Israel shall keep himself to his own inheritance.

5. D. vii. 1. 2. 3. 4.

When the Lord thy God shall bring thee into the land whither thou goest to possess it, and hath cast out many nations before thee, the Hittites, and the Girgashites, and the Amorites, and the Canaanites, and the Perizzites, and the Hivites, and the Jebusites, thou shalt smite them, and utterly destroy them, thou shalt make no covenant with them, nor shew mercy unto them: Neither shalt thou make marriages with them; thy daughter thou shalt not give unto his son, nor his daughter shalt thou take unto thy son *. For they will turn away thy son from following me that they may serve other gods.

6. D. xxiv. 1. 2. 3. 4.

When a man hath taken a wife and married her, and it come to pass that she find no favour in his eyes, because he hath found some uncleanness in her: then let him write

* Ne quis Christianam mulierem in matrimonium Judæus accipiat, neque Judææ Christianus conjugium sortiatur; nam si quis aliquid hujusmodi admiserit, adulterii vicem commissi hujusmodi crimen obtinebit, libertate in accusandum publicis quoque vocibus relaxata. *L. 6. C. de Judæis et cælic.* See also *Hein. inst.* § 163.

her

I. Tit. 6. *the Judicial Law of Moses.* 17

her a bill of divorcement, and give it in her hand, and send her out of his house. § 1. And when she is departed out of his house, she may go and be another man's wife. § 2. And if the latter husband hate her, and write her a bill of divorcement, and giveth it in her hand, and sendeth her out of his house; or if the latter husband die, which took her to be his wife; her former husband which sent her away,¹ may not take her again to be his wife, after that she is defiled.

7. D. xxiv. 5.

When a man hath taken a new wife, he shall not go out to war; neither shall he be charged with any business, but he shall be free at home one year, and shall cheer up his wife which he hath taken.

T I T L E VI.

Vows.

1. D. xxiii. 21. 22.

WHEN thou shalt vow a vow unto the Lord thy God, thou shalt not slack to pay it: for the Lord thy God will surely require it of thee; and it would be sin in thee. But if

thou shalt forbear to vow, it shall be no sin in thee.

2. N xxx. 2. 3. 4. 5. 6. 7. 8. 9.

If a man vow a vow unto the Lord, or swear an oath to bind his soul with a bond; he shall not break his word, he shall do according to all that proceedeth out of his mouth. § 1. If a woman also vow a vow unto the Lord, and bind herself by a bond, being in her father's house in her youth; and her father hear her vow, and hold his peace*: then all her vows shall stand. § 2. But if her father disallow her in the day that he heareth; not any of her vows shall stand: and the Lord shall forgive her, because her father disallowed her. § 3. And if she had at all an husband when she vowed, or uttered ought out of her lips, wherewith she bound her soul; and her husband heard it, and held his peace at her in the day that he heard it: then her vows and her bond shall stand. § 4. But if her husband disallow her on the day that he heard it; then he shall make her vow which she vowed, and that which she uttered with her lips, wherewith she bound her soul, of none effect: and the Lord shall forgive her.

* See Obs. XII.

§ 5. But every vow of a widow, and of her that is divorced, wherewith they have bound their souls, shall stand against her.

T I T L E VII.

De jure militari *.

1. N. i. 2. 3.

TAKE the sum of all the congregation of the children of Israel, after their families, by the house of their fathers, with the number of their names, every male by their poll; from twenty years old and upwards, all that are able to go forth to war in Israel.

2. D. xx. 5. 6. 7. 8.

And the officers shall speak unto the people, saying, § 1. What man is there that hath built a new house, and hath not dedicated it? let him go and return to his house, lest he die in the battle, and another man dedicate it. § 2. And what man is he that hath planted a vineyard, and hath not yet eaten of it? let him also go and return unto his house, lest

* This title is very well explained by Lowman, in his dissertation on the civil government of the Hebrews, ch. 4. p. 51. et seqq.

he die in the battle, and another man eat of it. § 3. And what man is there that hath betrothed a wife, and hath not taken her? let him go and return unto his house, lest he die in battle, and another man take her. § 4. What man is there that is fearful and faint-hearted? let him go and return unto his house, lest his brethrens heart faint as well as his heart.

B O O K II.

T I T L E I.

De acquirendo rerum dominio.

1. G. I. 26. 27.

GOD said, Let us make man in our image, after our likeness: and let him have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth. So God created man.

2. G. ix. 1. 2. 3.

And God blessed Noah and his sons, and
said

said unto them, Be fruitful, and multiply, and replenish the earth. And the fear of you, and the dread of you shall be upon every beast of the earth, and upon every fowl of the air, upon all that moveth upon the earth, and upon all the fishes of the sea ; into your hand are they delivered *. § 1. Every moving thing that liveth shall be meat for you ; even as the green herb have I given you all things : § 2. But flesh with the life thereof, which is the blood thereof, shall you not eat.

3. D. xxii. 6. 7.

If a bird's nest chance to be before thee in the way in any tree, or on the ground, whether they be young ones, or eggs, and the dam sitting upon the young, or upon the eggs, thou shalt not take the dam with the young. But thou shalt in any wise let the dam go, and take the young to thee, that it may be well with thee, and that thou mayst prolong thy days.

4. L. xix. 19.

Thou shalt not let thy cattle gender with a

* See Obs. IX.

divers kind: thou shalt not sow thy field with mingled seed *.

5. D. xx. 10.—19.

When thou comest nigh unto a city to fight against it, then proclaim peace unto it. § 1. If it make thee answer of peace, and open unto thee, then it shall be that all the people found therein shall be tributaries unto thee, and they shall serve thee. § 2. If it will make no peace with thee, but will make war against thee, then thou shalt besiege it. § 3. And when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword. § 4. But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself: and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee. § 5. Thus shalt thou do unto all the cities which are very far off from thee, which are not of the cities of these nations. But of the cities of these people which the Lord thy God doth give thee for an inheritance, thou shalt save alive nothing that breatheth; that they teach you not to do after all their abominations, which they have done unto their gods.

* See Spencer de legibus Heb. lib. 2. c. 19.

6. D xx. 19. 20.

When thou shalt besiege a city, in making war against it to take it, thou shalt not destroy the trees thereof by forcing an ax against them : for thou mayst eat of them, and thou shalt not cut them down (for the tree of the field is man's life) to employ them in the siege. Only the trees which thou knowest that they be not trees for meat, thou shalt destroy and cut them down ; and thou shalt build bulwarks against the city that maketh war with thee.

7. N. xxvi. 2. 53. 54. 56.

Take the sum of all the congregation of the children of Israel, from twenty years old and upward, throughout their fathers house, all that are able to go to war. § 1. Unto these the land shall be divided for an inheritance, according to the number of names. § 2. To many thou shalt give the more inheritance, and to few thou shalt give the less inheritance. § 3. Notwithstanding, the land shall be divided by lot : according to the names of the tribes of their fathers they shall inherit. According to the lot shall the possession thereof be divided*.

* See, as to the division of the land, Lowman's dissertation already quoted, ch. 4.

8. N. xviii. 23. 24.

The Levites shall do the service of the tabernacle of the congregation, and they shall bear their iniquity: it shall be a statute for ever throughout your generations, that among the children of Israel they have no inheritance.

§ 1. But the tithes of the children of Israel I have given to the Levites to inherit: therefore I have said unto them, Among the children of Israel they shall have no inheritance.

9. N. xxxv. 2. 3. 4.

Command the children of Israel, that they give unto the Levites of the inheritance of their possession, cities to dwell in: and ye shall give also unto the Levites suburbs for the cities round about them. And the cities shall they have to dwell in, and the suburbs of them shall be for their cattle, and for their goods, and for all their beasts. § 1. And the suburbs of the cities which ye shall give unto the Levites, shall reach from the wall of the city and outward, a thousand cubits round about.

T I T L E

T I T L E II.

Servitude.

D. xxii. 8.

WHen thou buildest a new house, then thou shalt make a battlement for thy roof, that thou bring not blood upon thine house, if any man fall from thence *.

T I T L E III.

Succession.

1. N. xxvii. 8. 9. 10. 11.

IF a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter. § 1. And if he have no daughter, then ye shall give his inheritance unto his brethren. § 2. And if he have no brethren, then ye shall give his inheritance unto his father's brethren. § 3. And if his father have no brethren, then ye shall give his inheritance unto his kinsman that is next to him of his family, and he shall possess it †.

2. D.

* See Obs. XI.

† See, as to succession among the Jews, Lord
U Stair's

2. D. xxi. 15. 16. 17.

If a man have two wives, one beloved and another hated, and they have born him children, both the beloved and the hated; and if the first-born son be her's that was hated: then it shall be, when he maketh his sons to inherit that which he hath, that he may not make the son of the beloved, first-born, before the son of the hated, which is indeed the first-born: but he shall acknowledge the son of the hated for the first-born, by giving him a double portion of all that he hath: for he is the beginning of his strength, the right of the first-born is his.

B O O K III.

T I T L E I.

De rebus creditis.

1. D. xxiii. 19. 20.

THou shalt not lend upon usury to thy brother; usury of money, usury of

Stair's Instit. lib. 2. tit. 4. § 9. & seqq.; and Lord Chief Justice Hale's history of the common law of England, ch. 11.

viſuals,

Tit. 2. *the Judicial Law of Moses.* 27

victuals, usury of any thing. § 1. Unto a stranger thou mayst lend upon usury, but unto thy brother thou shalt not lend upon usury.

2. D. xv. 1. 2. 3. 4.

At the end of every seven years thou shalt make a release. § 1. Every creditor that lendeth ought unto his neighbour, shall release it, he shall not exact it of his neighbour, or of his brother, because it is called the Lord's release. § 2. Of a foreigner thou mayst exact it again: but that which is thine with thy brother, thine hand shall release: § 3. Save when there shall be no poor among you: for the Lord shall greatly bless thee in the land.

T I T L E II.

Commodate.

E. xxii. 14. 15.

IF a man borrow ought of his neighbour, and it be hurt, or die, the owner thereof being not with it; he shall surely make it good.

§ 1. But if the owner thereof* be with it, he shall

* *But if the owner thereof, &c.*] Poterat enim et
U 2 dominus

shall not make it good. § 2. If it be an hired thing, it came for his hire.

T I T L E III.

Deposit.

1. E. xxii. 7.—13.

IF a man shall deliver unto his neighbour money, or stuff to keep, and it be stolen out of the man's house; if the thief be found, let him pay double. If the thief be not found, then the master of the house shall be brought unto the judges, to see whether he have put his hands unto his neighbour's goods. § 1. For all manner of tref-

dominus adhibere diligentiam; talis est casus communi amico ad cœnam invitato, et in id commodato argento in l. rebus 18. ff. Commod. Grot. annot. ad h. l. The words of this law are, Hæc ita si duntaxat accipientis gratia commodata sit res, at si utriusque veluti si communem amicum ad cœnam invitaverimus, tuque ejus rei curam suscepisses, et ego tibi argentum commodaverim, scriptum quidem apud quosdam invenio, quasi datum tantum præstare debeat; sed videndum est ne re et culpa præstanda sit, ut ita culpæ fiat æstimatio, sicut in rebus pignori datis et dotalibus fieri solet.

pass,

Tit. 3. the Judicial Law of Moses. 29

pass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his: the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbour. § 2. If a man deliver unto his neighbour an ass, or an ox, or a sheep, or any beast to keep; and it die, or be hurt, or driven away *, no man seeing: then shall an oath of the Lord be between them both, that he hath not put his hand unto his neighbour's goods: and the owner of it shall accept thereof, and he shall not make it good. § 3. And if it be stolen from him, he shall make restitution unto the owner thereof. § 4. If it be torn in pieces; then let him bring it for witness, and he shall not make good that which was torn.

* *Driven away, &c.*] Hostium enim incursum non præstat is qui rem commodatam accepit, nempe si re commodata ex præscripto fuerit usus: quod hic addunt Hebræi. Ita et casus in l. rebus 18. ff. Comm. Adde l. Si ut certo 5. § 4. ff. eod. et Instit. Quibus modis re contr. obl. § 2. Grot.

T I T L E IV.

Pledge.

1. D. xxiv. 10. 11.

When thou dost lend thy brother any thing, thou shalt not go into his house to fetch his pledge. Thou shalt stand abroad, and the man to whom thou dost lend, shall bring out the pledge abroad unto thee.

2. E. xxii. 26. 27.

If thou at all take thy neighbour's raiment to pledge, thou shalt deliver it unto him by that the sun goeth down : for that is his covering only, it is his raiment for his skin : wherein shall he sleep ? And it shall come to pass, when he crieth unto me, that I will hear : for I am gracious.

3. D. xxiv. 17.

Thou shalt not pervert the judgment of the stranger, nor of the fatherless, nor take a widow's raiment to pledge.

4. D. xxiv. 6.

No man shall take the nether or the upper
millstone

millstone to pledge : for he taketh a man's life to pledge*.

T I T L E V.

Sale.

1. L. xxv. 14.

IF thou sell ought unto thy neighbour, or buyest ought of thy neighbour's hand; ye shall not oppress one another†.

2. L. xix. 35. 36.

Ye shall do no unrighteousness in judgment, in mete-yard, in weight, or in measure. Just balances, just weights, a just ephah, and a just hin shall ye have.

* *Pari ratione a Romanis vetitum pignoris causa abstrahere boves aratorios, vel instrumentum aratorium. Grot. Vide l. 7. 8. et authen. C. quæ res pign. obl. poss. By our statute 1503. 98. labouring horses and oxen, and other goods belonging to the plough, cannot be poinded in labouring-time, unless there be no other goods. There is a like statute in England. See the Abridg. of our statute law, voce Poinding.*

† See Obs. VIII.

3. D. xxv. 13. 14. 15.

Thou shalt not have in thy bag divers weights, a great and a small. Thou shalt not have in thine house divers measures, a great and a small. But thou shalt have a perfect and just weight, a perfect and just measure.

4. L. xxv. 23. 24. 8. 9. 10. 13. 14. 15. 16.

The land shall not be sold for ever: for the land is mine, for ye are strangers and sojourners with me. And in all the land of your possession, ye shall grant a redemption for the land. § 1. Thou shalt number seven sabbaths of years unto thee, seven times seven years, and the space of the seven sabbaths of years shall be unto thee forty and nine years. Then shalt thou cause the trumpet of the jubilee to sound, on the tenth day of the seventh month; and ye shall hallow the fiftieth year, and proclaim liberty throughout all the land, unto all the inhabitants thereof: in the year of this jubilee ye shall return every man unto his possession. § 2. According to the number of years after the jubilee, thou shalt buy of thy neighbour, and according unto the number of years of the fruits he shall sell unto thee: according to the multitude of years thou shalt increase the price thereof, and according

Tit. 5. *the Judicial Law of Moses.* 33

ding to the fewness of years thou shalt diminish the price of it: for according to the number of the years of the fruits doth he sell unto thee.

5. L. xxv. 25. 26. 27. 28.

If thy brother be waxen poor, and hath sold away some of his possession, and if any of his kin come to redeem it, then shall he redeem that which his brother sold. § 1. And if the man have none to redeem it, and himself be able to redeem it: then let him count the years of the sale thereof, and restore the overplus unto the man to whom he sold it. § 2. But if he is not able to restore it to him, then that which is sold shall remain in the hand of him that hath bought it, until the year of jubilee: and in the jubilee it shall go out, and he shall return unto his possession.

6. L. xxv. 29. 30. 31.

If a man sell a dwelling-house in a walled city, then he may redeem it within a whole year after it is sold. § 1. If it be not redeemed within the space of a full year; then the house that is in the walled city, shall be established for ever to him that bought it, throughout his generations: it shall not go out

out in the jubilee. § 2. But the houses of the villages which have no walls round about them, shall be counted as the fields of the country: they may be redeemed, and they shall go out in the jubilee. § 3. Notwithstanding, the cities of the Levites, and the houses of the cities of their possession, may the Levites redeem at any time. § 4. And if a man purchase of the Levites, then the house that was sold, and the city of his possession, shall go out in the year of jubilee. § 5. But the field of the suburbs of their cities may not be sold, for it is their perpetual possession.

T I T L E VI.

Location.

1. D. xxiv. 14. 15.

THou shalt not oppress an hired servant that is poor and needy, whether he be of thy brethren, or of thy strangers that are in thy land within thy gates. § 1. At his day thou shalt give him his hire, neither shall the sun go down upon it, for he is poor, and setteth his heart upon it: lest he cry against thee unto the Lord, and it be sin unto thee.

2. D.

Tit. 1. *the Judicial Law of Moses.* 35

2. D. xxv. 4.

Thou shalt not muzzle the ox when he treadeth out the corn.

3. E. xxiii. 12.

Six days thou shalt do thy work, and on the seventh day thou shalt rest: that thine ox and thine ass may rest, and the son of thy handmaid, and the stranger may be refreshed.

B O O K IV.

T I T L E I.

Theft.

I. E. xx. 17.

THOU shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife, nor his man-servant, nor his maid-servant, nor his ox, nor his ass, nor any thing that is thy neighbour's*.

* Cogitationis poenam nemo patitur. l. 18. ff. de poenis.

2. E.

2. E. xx. 15.

Thou shalt not steal.

3. E. xxii. 1. 4. 2. 3.

If a man shall steal an ox or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep. § 1. If the theft be certainly found in his hand alive, whether it be ox, or ass, or sheep; he shall restore double. § 2. If a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him. § 3. If the sun be risen upon him *, there shall be blood shed for him; for he should make full restitution: § 4. If he have nothing, then he shall be sold for his theft.

4. D. xxiii. 24. 25.

When thou comest into thy neighbour's vineyard, then thou mayst eat grapes thy fill, at thine own pleasure; but thou shalt not put any in thy vessel †. When thou comest

* Duodecim tabulæ nocturnum furem quoquo modo, diurnum autem, si sese telo defenderit, interfici impune voluerunt. See Crit. exp. of the Pent. and the Collat. leg. Mosaic. & Rom. Tit. VI.

† See Obs. XIII

into the standing-corn of thy neighbours, then thou mayst pluck the ears with thine hands: but thou shalt not move a sickle unto thy neighbours standing-corn.

T I T L E II.

Damage.

1. E. xxi. 33. 34.

IF a man shall open a pit, or if a man shall dig a pit, and not cover it, and an ox or an ass fall therein *; the owner of the pit shall make it good, and give money unto the owner of them; and the dead beast shall be his.

2. L. xxiv. 18.

He that killeth a beast, shall make it good; beast for beast.

3. D. xxii. 1. 2. 3.

Thou shalt not see thy brother's ox or his

* Qui foveas urforum cervorumque capiendorum causa faciunt, si in itineribus fecerunt, eoque aliquid decedit factumque deterius est, lege Aquilia obligati sunt; at si in aliis locis ubi fieri solent, fecerunt, nihil tenentur, l. 28. pr. ff. ad leg. Aquil. Grot.

X

sheep

sheep go astray, and hide thyself from them : thou shalt in any case bring them again unto thy brother. § 1. If thy brother be not nigh unto thee, or if thou know him not, then thou shalt bring it unto thine own house, and it shall be with thee until thy brother seek after it, and thou shalt restore it to him again. § 2. In like manner shalt thou do with his ass, and so shalt thou do with his raiment, and with all lost thing of thy brother's, which he hath lost, and thou hast found. § 3. Thou shalt not see thy brother's ass or his ox fall down by the way, and hide thyself from them : thou shalt surely help him to lift them up again.

4. E. xxiii. 4. 5.

If thou meet thine enemy's ox or his ass going astray, thou shalt surely bring it back to him again. If thou see the ass of him that hateth thee, lying under his burden, and wouldst forbear to help him; thou shalt surely help with him.

5. E. xxii. 6.

If fire break out, and catch in thorns, so that the stacks of corn, or the standing-corn, or the field be consumed therewith; he that kindled the fire, shall surely make restitution*.

6. E.

* Si quis in stipulam suam vel spinam comburendæ

6. E. xxii. 5.

If a man shall cause a field or vineyard to be eaten, and shall put in his beast, and shall feed in another man's field: of the best of his own field, and of the best of his own vineyard shall he make restitution *.

rendæ ejus causa ignem immiserit, et ulterius evagatus et progressus ignis alienam segetem vel vineam læserit, requiramus num imperitia ejus aut negligentia id accidit: nam si die ventoso id fecit, culpæ reus est; nam et qui occasionem præstat, damnum fecisse videtur. In eodem crimine est et qui non observavit ne ignis longius procederet; at si omnia quæ oportuit observavit, vel subita vis venti longius ignem produxerit, caret culpa, l. 30. § 3. ff. ad leg. Aquil. See also l. 27. § 9. ff. eod. Grot.

* Si secundum naturam agrum depascendo nocuerat (quadrupes), competeat actio in factum de pastu pecoris, l. 14. § ult. ff. de præscr. verb.; quæ et ipsa noxalis fuisse videtur Paull. sent. rec. lib. 1. tit. xv. § 1. Sin dominus immiserat bestiam, actioni ex lege Aquilia locus erat, l. ult. C. de leg. Aquil. Hein. Inst. § 1239.

T I T L E III.

Si quadrupes pauperiem fecisse dicatur.

1. E. xxi. 28. 29. 30. 31. 32. 35. 36.

IF an ox gore a man or a woman, that they die; then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit. § 1. But if the ox were wont to push with his horn in time past, and it hath been testified to his owner *, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death. § 2. If there be laid on him a sum of money, then he shall give for the ransom of his life, whatsoever is laid upon him. § 3. Whether he have gored a son, or have gored a daughter, according to this judgment shall it be done unto him. § 4. If the ox shall push a man-servant, or maid-servant; he shall give unto their master thirty shekels of silver,

* Hæc tamen actio (scil. ex lege Aq.) ex causa danda est; id est, si neque denunciatum est, neque scierit aut providere potuerit; et multa hujusmodi deprehenduntur, quibus summovetur petitor, si evitare periculum potuerit, l. 28. § 1. ff. ad leg. Aquil. Grot.

and

and the ox shall be stoned. § 5. And if one man's ox hurt another's *, that he die, then they shall sell the live ox, and divide the money of it, and the dead ox also they shall divide. § 6. Or if it be known that the ox hath used to push in time past, and his owner hath not kept him in; he shall surely pay ox for ox, and the dead shall be his own.

T I T L E IV.

De termino moto.

D. xix. 14.

THou shalt not remove thy neighbour's land-mark, which they of old time have set in thine inheritance which thou shalt inherit, in the land that the Lord thy God giveth thee to possess it.

* *And if one man's ox hurt another's, &c.]* Cum arietes vel boves commisissent, et alter alterum occidit, Quintus Mucius distinxit, ut si quidem is perisset qui adgressus erat, cessaret actio; si is qui non provocaverat, competeret actio, l. 1. § 11. ff. Si quadr. paup. As to this point of the Jewish law, see Hale's pleas of the crown, vol. 1. p. 430. 431.

T I T L E V.

Injury.

1. L. xix. 14. 16. 17. 18.

THou shalt not curse the deaf, nor put a stumbling-block before the blind. § 1. Thou shalt not go up and down as a tale-bearer among thy people. § 2. Thou shalt not hate thy brother in thine heart: thou shalt in any wise rebuke thy neighbour, and not suffer sin upon him. § 3. Thou shalt not avenge, nor bear any grudge against the children of thy people, but thou shalt love thy neighbour as thyself.

2. L. xxiv. 19.

If a man cause a blemish in his neighbour; as he hath done, so shall it be done unto him.

3. E. xxi. 18.

If men strive together, and one smite another with a stone, or with his fist, and he die not, but keepeth his bed: if he rise again, and walk abroad upon his staff, then shall he that smote him be quit: only he shall pay for the loss of his time, and shall cause him to be thoroughly healed.

4. E.

4. E. xxi. 17. 15.

He that curseth his father, or his mother, shall surely be put to death. § 1. And he that smiteth his father, or his mother, shall be surely put to death.

T I T L E VI.

*Murder *.*

1. G. ix. 6.

WHoso sheddeth man's blood, by man shall his blood be shed.

2. E. xxi. 13. 14.

And if a man lie not in wait, but God deliver him into his hand; then I will appoint thee a place whither he shall flee. § 1. But if a man come presumptuously upon his neighbour to slay him with guile; thou shalt take him from mine altar, that he may die.

3. N. xxxv. 13. 14. 15.

Six cities shall ye have for refuge. Ye shall give three cities on this side Jordan, and three cities shall ye give in the land of Canaan,

* See Obs. XVII.

which

which shall be cities of refuge. These six cities shall be a refuge, both for the children of Israel, and for the stranger, and for the sojourner among them: that every one that killeth any person unawares, may flee thither.

4. D. xix. 5. 6.

As when a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the ax to cut down the tree, and the head slippeth from the helve, and lighteth upon his neighbour, that he die; he shall flee unto one of those cities, and live: lest the avenger of the blood pursue the slayer, while his heart is hot; and overtake him, because the way is long, and slay him, whereas he was not worthy of death, inasmuch as he hated him not in time past *.

5. N.

* Divus Hadrianus rescripsit, eum qui hominem occidit, si non occidendi animo hoc admisit, absolvi posse; et qui hominem non occidit, sed vulneravit, ut occidat, pro homicida damnandum; et ex re constituendum hoc. Nam si gladium strixerit, et in eo percusserit, indubitate occidendi animo id eum admisisse; sed si clavi percussit, aut cucuma in rixa, quamvis ferro percusserit, tamen non occidendi animo, leniendam poenam ejus, qui in rixa causa magis quam voluntate homicidium admisit,

l. l.

live

5. N. xxxv. 16.—28.

And if he smite him with an instrument of iron so that he die, he is a murderer: the murderer shall surely be put to death. § 1. And if he smite him with throwing a stone (wherewith he may die) and he die, he is a murderer: the murderer shall surely be put to death. § 2. Or if he smite him with an hand-weapon of wood (wherewith he may die) and he die, he is a murderer: the murderer shall surely be put to death. § 3. If he thrust him of hatred, or hurl at him by laying of wait, that he die, or in enmity smite him with his hand, that he die: he that smote him shall surely be put to death; for he is a murderer: the revenger of blood shall slay the murderer, when he meeteth him. § 4. But if he thrust him suddenly without enmity, or have cast

l. 1. § 3. ff. ad leg. Cornel. de sic. See the Collatio leg. Mosaic. & Rom. tit. 1.; as also the informations for and against Finhaven, which are inserted in his trial, and in Lothian's form of process before the court of justiciary. See also, by all means, the notes on Hale's pleas of the crown, p. 3. 4. 89. where this part of the Jewish law, which relates to murder and the avenger of blood, is very well illustrated.

upon

upon him any thing without laying of wait; or with any stone wherewith a man may die, seeing him not, and cast it upon him that he die, and was not his enemy, neither sought his harm: then the congregation shall judge between the slayer, and the revenger of blood, according to these judgments. § 5. And the congregation shall deliver the slayer out of the hand of the revenger of blood, and the congregation shall restore him to the city of his refuge, whither he was fled: and he shall abide in it until the death of the high priest, which was anointed with holy oil. § 6. But if the slayer shall at any time come without the border of the city of his refuge, whither he was fled; and the revenger of blood find him without the borders of the city of his refuge, and the revenger of blood kill the slayer; he shall not be guilty of blood: because he should have remained in the city of his refuge, until the death of the high priest: but after the death of the high priest, the slayer shall return unto the land of his possession.

6. E. xxi. 22. 23.

If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon
upon

Tit. 7. *the Judicial Law of Moses.* 47

upon him; and he shall pay as the judges determine. § 1. And if any mischief follow, then thou shalt give life for life.

T I T L E VII.

Plagium.

E. xxi. 16.

HE that stealeth a man, and selleth him, or if he be found in his hand, he shall surely be put to death.

T I T L E VIII.

Treason.

I. E. xix. 1.—9.

IN the third month, when the children of Israel were gone forth out of the land of Egypt, the same day came they into the wilderness of Sinai. And Moses went up unto God, and the Lord called unto him out of the mountain, saying, Thus shalt thou say to the house of Jacob, and tell the children of Israel; Ye have seen what I did unto the Egyptians, and how I bare you on eagles wings, and brought you unto myself. Now therefore, if ye
will

will obey my voice indeed, and keep my covenant, then ye shall be a peculiar treasure unto me above all people: for all the earth is mine. And ye shall be unto me a kingdom of priests, and an holy nation. And Moses came and called for the elders of the people, and laid before their faces all these words. And all the people answered together, and said, All that the Lord hath spoken, we will do. And Moses returned the words of the people unto the Lord.

2. E. xx. 3.—6.

Thou shalt have no other gods before me.
§ 1. Thou shalt not make unto thee any graven image, or any likeness of any thing, that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. § 2. Thou shalt not bow down thyself to them, nor serve them: for I the Lord thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me: and shewing mercy unto thousands of them that love me, and keep my commandments.

3. D. xvii. 2. 3. 4. 5.

If there be found among you man or woman that hath wrought wickedness in the sight of
of

Tit. 8. *the Judicial Law of Moses.* 49

of the Lord thy God, in transgressing his covenant, and hath gone and served other gods, and worshipped them, either the sun, or moon, or any of the host of heaven, which I have not commanded; and it be told thee, and thou hast heard of it, and inquired diligently, and behold, it be true, and the thing certain, that such abomination is wrought in Israel: then shalt thou bring forth that man or that woman (which have committed that wicked thing) unto thy gates, and shalt stone them with stones, till they die.

4. D. xiii. 6. & seqq.

If thy brother the son of thy mother, or thy son, or thy daughter, or the wife of thy bosom, or thy friend, which is as thine own soul, entice thee secretly, saying, Let us go and serve other gods (which thou hast not known, thou, nor thy fathers; namely, of the gods of the people which are round about you, nigh unto thee, or far off from thee, from the one end of the earth, even unto the other end of the earth): thou shalt not consent unto him, nor hearken unto him; neither shall thine eye pity him, neither shalt thou spare, neither shalt thou conceal him. But

* See Obs. XVI.

Y

thou

thou shalt surely kill him; thine hand shall be first upon him to put him to death, and afterwards the hand of all the people. And thou shalt stone him with stones, that he die: because he hath sought to thrust thee away from the Lord thy God, which brought thee out of the land of Egypt, from the house of bondage.

§ 1. If thou shalt hear say in one of thy cities, certain men, the children of Belial, are gone out from among you, and have withdrawn the inhabitants of their city, saying, Let us go and serve other gods; then shalt thou inquire, and make search, and ask diligently: and behold, if it be truth, and the thing certain, that such abomination is wrought among you: thou shalt surely smite the inhabitants of that city with the edge of the sword, destroying it utterly, and all that is therein, and the cattle thereof, with the edge of the sword. And thou shalt gather all the spoil of it into the midst of the street thereof, and shalt burn with fire the city, and all the spoil thereof every whit, for the Lord thy God: and it shall be an heap for ever, it shall not be built again.

5. D. xiii. 1.—6.

If there arise among you a prophet, or a dreamer

Tit. 8. *the Judicial Law of Moses.* 51

dreamer of dreams, and giveth thee a sign or a wonder, and the sign or the wonder come to pass, whereof he spake unto thee, saying, Let us go after other gods, and let us serve them ; thou shalt not hearken unto the words of that prophet, or that dreamer of dreams : for the Lord your God proveth you, to know whether you love the Lord your God with all your heart, and with all your soul. That prophet, or that dreamer of dreams shall be put to death, because he hath spoken to turn you away from the Lord your God, which brought you out of the land of Egypt, and redeemed you out of the house of bondage.

6. L. xx. 27. & 6.

A man also or a woman that hath a familiar spirit, or that is a wizard, shall surely be put to death : they shall stone them with stones. § 1. And the soul that turneth after such as have familiar spirits, and after wizards, to go a-whoring after them, I will even set my face against that soul, and will cut him off from among his people.

7. L. xxiv. 16.

He that blasphemeth the name of the Lord, shall surely be put to death, and all the congregation shall certainly stone him : as well

the stranger, as he that is born in the land, when he blasphemeth the name of the Lord, shall be put to death.

8. E. xx. 7.

Thou shalt not take the name of the Lord thy God in vain: for the Lord will not hold him guiltless that taketh his name in vain.

T I T L E IX.

Adultery.

D. xxii. 22. 23. 24. 25. 26.

IF a man be found lying with a woman married to an husband, then they shall both of them die. § 1. If a damsel that is a virgin be betrothed unto an husband, and a man find her in the city, and lie with her: then ye shall bring them both out unto the gate of that city, and ye shall stone them with stones, that they die; the damsel, because she cried not, being in the city; and the man, because he hath humbled his neighbour's wife. § 2. But if a man find a betrothed damsel in the field, and the man force her, and lie with her: then the man only that lay with her, shall die. But unto the damsel thou shalt do nothing, there is in the damsel no sin worthy
of

of death: for as when a man riseth against his neighbour, and slayeth him, even so is this matter. For he found her in the field, and the betrothed damsel cried, and there was none to save her.

T I T L E X.

Stuprum.

1. E. xxii. 16. 17.

AND if a man entice a maid that is not betrothed, and lie with her; he shall surely endow her to be his wife. If her father utterly refuse to give her unto him, he shall pay money according to the dowry of virgins.

2. L. xix. 20. 21.

Whosoever lieth carnally with a woman that is a bond-maid betrothed to an husband, and not at all redeemed, nor freedom given her; she shall be scourged: they shall not be put to death, because she was not free. And he shall bring unto the Lord, a ram for a trespass-offering.

3. D. xxiii. 2.

A bastard shall not enter into the congregation

tion of the Lord : even to his tenth generation shall he not enter into the congregation of the Lord *.

T I T L E XI.

Rape.

D. xxii. 28. 29.

IF a man find a damsel that is a virgin, which is not betrothed, and lay hold on her, and lie with her, and they be found : then the man that lay with her, shall give unto the damsel's father fifty shekels of silver, and she shall be his wife, because he hath humbled her, he may not put her away all his days.

* The meaning is not, that he shall not be admitted as a proselyte to the Jewish religion, or that he shall be debarred from the public worship of the true God, as the phrase sometimes signifies ; for that privilege was granted to persons of all nations indiscriminately, provided they renounced idolatry : but the sense is, that such a one shall not be deemed an Israelite, nor have his name entered in the public register ; particularly, he shall not be allowed to marry an Israelitish woman ; and, till he had that permission, no foreigner was accounted a member of the Jewish community. Crit. exp. of the Pent.

T I T L E

T I T L E XII.

De venere nefanda.

1. E. xxii. 19.

2. L. xx. 18.

3. L. xix. 19.

T I T L E XIII.

Probation.

1. D. xix. 15. & seqq.

ONE witness * shall not rise up against a man for any iniquity, or for any sin: at the mouth of two witnesses, or at the mouth of three witnesses shall the matter be established. § 1. If a false witness rise up against any man to testify against him that which is wrong: then both the men between whom the controversy is, shall stand before the Lord,

* Simili modo sancimus, ut unius testimonium nemo judicum in quacunque causa patiatur admitti. Et nunc manifeste sancimus, ut unius omnino testis responsio non audiatur, etiamsi præclaræ curiæ honore fulgeat. l. 9. § c. de testib.

before

before the priests, and the judges which shall be in those days. And the judges shall make diligent inquisition: and behold, if the witness be a false witness, and hath testified falsely against his brother: then shall ye do unto him, as he had thought to have done unto his brother.

2. D. xvii. 6. 7.

At the mouth of two witnesses, or three witnesses, shall he that is worthy of death, be put to death; but at the mouth of one witness he shall not be put to death. § 1. The hands of the witnesses shall be first upon him to put him to death, and afterward the hands of all the people.

T I T L E XIV.

Punishment.

1. D. xix. 21.

Life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.

2. E. xxi. 25.

Burning for burning, wound for wound, stripe for stripe.

3. D.

3. D. xxiv. 16.

The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers: every man shall be put to death for his own sin.

4. D. xxv. 1. 2. 3.

If there be a controversy between men, and they come unto judgment, that the judges may judge them, then they shall justify the righteous, and condemn the wicked. And it shall be, if the wicked man be worthy to be beaten, that the judge shall cause him to lie down, and to be beaten before his face, according to his fault, by a certain number. Forty stripes he may give him, and not exceed: lest if he should exceed, and beat him above these with many stripes, then thy brother should seem vile unto thee.

5. D. xxi. 22. 23.

If a man have committed a sin worthy of death, and he be to be put to death, and thou hang him * on a tree: his body shall not remain

* *Be put to death, and thou hang him, &c.] This shews*

remain all night upon the tree, but thou shalt in any wise bury him that day ; that thy land be not defiled, for he that is hanged is accursed of God.

shews that the punishment was not the same with the Roman crucifixion, for they hanged men alive upon the gibbet, and there let them expire ; but this was only hanging up their dead bodies, and exposing them to open shame for a time. See 2 Sam. iv. 12. Crit. exp. of the Pent.



TABLE

TABLE of the CONTENTS of the Judicial Law of MOSES.

B O O K I.

T I T L E I.

State and distinction of persons.

1. Persons are either male or female, who are
2. Distinguished by dress.
3. Respect must be shewn to old men.
4. Strangers subject to the moral law.
5. A stranger cannot be elected king.
6. Money may be lent at interest to strangers.
7. Naturalization.
8. *Personæ miserabiles*
9. Are intitled to the gleanings of corn-fields, olive-trees, and vineyards.
10. Tithes to be applied every third year to their use.

T I T L E II.

Jurisdiction and judges.

1. Judge-ordinary.
2. Supreme court — contempt of authority.
3. *Officium judicis.*
4. Form of appeals.

T I T L E III.

Slaves.

1. An Israelite who has sold himself to an Israelite, is free at the jubilee.
2. Is to be furnished with a stock when set at liberty.
3. What if he has a family?

3. What

4. What if he renounce the benefit of the jubilee?
5. An Israelite who has sold himself to a stranger, may be redeemed — by whom — in what manner.
6. Strangers who have become slaves to Israelites, are not free at the jubilee.
7. *Intolerabilis sævitia dominorum.*
8. Case of Hebrew maids sold by their parents.
9. Case of foreign slaves who have deserted from their masters.

T I T L E IV.

Parents and children.

1. *Operæ officiales.*
2. *De patria potestate.*
3. *Prostituentes filias.*

T I T L E V.

Marriage.

1. *Patria potestas solvitur nuptiis.*
2. Within what degrees marriage forbidden.
3. He whose brother died childless, ought to marry the widow — What if he refuses?
4. Entails.
5. *Nuptiæ noxiæ.*
6. Divorce.
7. *Premia nuptiarum.*

T I T L E VI.

Vows.

1. Vows must be performed.
2. Vows of a filias — of a wife — of a widow.

TITLE

T I T L E VII

De jure militari.

1. *Ætas militaris.*
2. *Missio honesta — missio ignominiosa.*

B O O K II.

T I T L E I.

De acquirendo rerum dominio.

1. Men have right to the earth and every thing in it,
2. *Ex jure cesso*—exception.
3. Law for preserving the game.
4. *Fætura — satio*
5. *Occupatio bellica.*
6. Law for the preservation of fruit-trees.
7. Division of the land.
8. Levites have no inheritance.
9. Their cities.

T I T L E II.

Servitude.

Legal servitude.

T I T L E III.

Succeſſion.

1. *Succeſſion ab intestato.*
2. *De inofficio testamento.*

B O O K III.

T I T L E I.

De rebus creditis.

1. Annualrent not to be exacted but from strangers.

Z

2. Poor

2. Poor debtors are discharged at the jubilee.

T I T L E II.

Commodate.

At whose peril.

T I T L E III.

Deposit.

At whose peril—oath of purgation—*lis inficiando crescit.*

T I T L E IV.

Pledge.

1. *Pignoris capio* not to be executed in the debtor's house.
2. A poor man's cloaths if pledged, must be returned to him at night.
3. Such pledges not to be taken from the widow or the fatherless.
4. Nor millstones from any person.

T I T L E V.

Sale.

1. Sale is a contract *bonæ fidei*.
2. Weights and measures
3. Must be just and uniform.
4. Purchase of lands.
5. *Retrañus gentilitius*.
6. *Prædia urbana* — *rustica*.

T I T L E VI.

Location.

1. 2. Servants wages.
3. *Feriæ*.

BOOK

B O O K IV.

T I T L E I.

Theft.

1. *Pæna cogitationis.*
2. *Fur manifestus—nocturnus ; diurnus.*
3. *Furtum rei minimæ.*

T I T L E II.

Damage.

1. 2. *De pecude occiso.*
3. 4. *Waif goods.*
5. *Reckless fire-raising.*
6. *De pastu pecorum.*

T I T L E III.

Si quadrupes pauperiem, &c.

T I T L E IV.

De termino moto.

T I T L E V.

Injury.

1. *Injuria levior.*
2. *Injuria realis.*
3. *Liberi corporis nulla æstimatio.*

T I T L E VI.

Murder.

1. *Murder a capital crime.*
2. *Casual homicide — forethought felony.*
3. *Cities of refuge.*
4. *Examples of casual homicide.*
5. *Circumstances from which dolus præsumitur—*
The slayer of a man *per infortunium* cannot
with safety quit the city of refuge, till the
death of the high priest.
6. *Abortion.*

T I T L E

T I T L E VII.

Plagium.

T I T L E VIII.

Treason.

1. 2. First species of high treason.
3. Punished with death.
4. *Conscii silentium* — treason committed by a city — confiscation.
5. Prophets, dreamers, &c.
6. A second species of high treason.
7. A third species of high treason.
8. *Crimen majestatis structius sic dictæ.*

T I T L E IX.

*Adultery.*Capital — *etiam in sponsa committitur.*

T I T L E X.

Stuprum.

1. *Ducat aut dotet.*
2. *De serua corrupta.*

T I T L E XI.

Rape.

T I T L E XII.

De venere nefanda.

T I T L E XIII.

Probation.

1. 2. Two witnesses necessary in all cases — false witness.

T I T L E XIV.

Punishment.

1. 2. *Lex talionis.*
3. *Delicta tenent suos auctores.*
4. Whipping.
5. Hanging.

y

e